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BRIEF FOR RESPONDENT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 198.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ARTHUR W. MACHEN,
Respondent.

H. VERNON ENEY,
ALEXANDER GORDON, III,
Attorneys for Respondent.

The Daily Record Co. Print, Baltimore.

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IN THE

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OCTOBER TERM, 1937.

No. 198.

THE UNITED STATES OF AMERICA,
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v.

ARTHUR W. MACHEN,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This case comes up on a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. The respondent sued in the District Court of the United States for the District of Maryland to recover the sum of $17.50, being the face amount of an interest coupon due December 15, 1925, formerly attached to a $1000. First Liberty Loan 3½% coupon bond of the United States issued on June 15, 1917, and maturing on June 15, 1947. The jurisdiction of the District Court was invoked under the provisions of U.S.C., Tit. 28, §41(20) which gives to the District Courts of the United States jurisdiction

"of all claims not exceeding $10,000.00 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable". The suit was instituted on December 30, 1935, and hence would not be barred by the Act of August 27, 1935 (c. 780 §2, U.S.C., Tit. 31, §773b) even if that Act were applicable to a suit of this nature.

The government contended that the bond to which the coupon in question had been attached had been called for redemption on June 15, 1935 and that all subsequent coupons were therefore void. The respondent, on the other hand, contended that since, at the time of the issuance of the notice of call for redemption, the government had no intention of redeeming the bond in gold coin and had, on the day of redemption, refused to redeem by payment in gold coin, the bond had not been validly called for redemption or redeemed and that accordingly the bond, and all coupons attached thereto, were still subsisting obligations of the United States.

The District Court entered a judgment in favor of the government (R. 9). On appeal to the Circuit Court of Appeals for the Fourth Circuit the judgment was reversed and the cause remanded (R. 32). A writ of certiorari was granted by this Court on October 11, 1937 (R. 34). The opinion of the Circuit Court of Appeals appears at pages 27-32 of the record and is reported in 87 Fed. (2d) 594.

THE QUESTION PRESENTED.

Since it is conceded by both parties that if the respondent's bond was validly called for redemption and redeemed as contended by the government, the respondent is not entitled to recover, and that otherwise he is entitled to recover, it will be seen that the only question presented is:

> Did the United States have the right to redeem the respondent's bond on June 15, 1935, by giving a notice of intention to redeem on that date when at the time of the issuance of the notice and at the date fixed for redemption the United States was not ready, able and willing to pay the principal of the bond in gold coin of the standard of value existing on June 15, 1917?

The respondent contends that the United States could not redeem his bond except by tendering payment therefor in gold coin after having given a notice of redemption with the bona fide intention to pay the bond in gold coin at the time fixed for redemption.

STATEMENT OF FACTS.

All of the facts of this case are set forth in two stipulations of facts (R. 10-18, 19). There was some testimony taken (R. 18-19) but at the request of the Court it was embodied in a supplemental stipulation. The District Court found the facts to be as set forth in the two stipulations (R. 9). A statement of the facts in narrative form may nevertheless prove helpful.

On June 15, 1917, the United States issued $2,000,000,000.00 of an authorized issue of $5,000,000,000.00 of gold bonds pursuant to the Act of Congress approved April

24, 1917 (ch. 4, § 1, 40 Stat. 35). A copy of one of the bonds so issued, which is identical in form and content with the respondent's bond, is attached to the Stipulation of Facts (R. 12-13). Pursuant to the terms of the Act of April 24th, 1917, and pursuant to U.S.C., Tit. 31, § 768, the bonds so issued provided for payment of both principal and interest in gold coin, in the following language:

> "The principal and interest of this bond shall be payable in United States gold coin of the present standard of value * * *" (R. 12).

At the time of the issuance of this bond, the Act of March 14, 1900 (31 Stat. 45, U.S.C., Tit. 31, § 314), was in force and under and pursuant to that statute a dollar in gold consisted of twenty-five and eight-tenths grains of gold, nine-tenths fine.

On March 22, 1933, the respondent, in reliance upon the good faith and credit of the United States, purchased and has ever since held and owned, and now holds and owns, one of the bonds issued by the United States as above set forth, in the denomination of $1000.00, being No. 47084 (R. 19).

On March 6, 1933, the President had declared "a bank holiday" until March 9, 1933, and thereafter a number of statutes, executive orders and orders of the Secretary of the Treasury affecting the currency were passed and issued. These regulations are referred to at length in the opinion of Mr. Chief Justice Hughes in *Norman v. B. & O. Railroad Co.*, 294 U. S. 240, 295-7, but it is here necessary to refer only to a few of the more important.

On April 5, 1933, the President by executive order (No. 6102, 12 U.S.C.A., § 248, note) required all persons to deliver all gold coin, gold bullion and gold certificates

to certain banks and accept "an equivalent amount" of other forms of currency therefor.

On May 12, 1933, the Agricultural Adjustment Act was passed and by section 43 of that Act (48 Stat. 51, U.S.C., Tit. 31, § 821) the President was authorized, under certain circumstances, to "fix the weight of the gold dollar" in such manner as not to "reduce its present weight by more than 50 per centum". However, the gold content of the dollar was not then reduced.

On June 5, 1933, a joint resolution of Congress (48 Stat. 112, U.S.C., Tit. 31, §§ 462, 463) was passed and approved, §463 providing as follows:

> "(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.
>
> "(b) As used in this section the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term

'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

On January 30, 1934, the "Gold Reserve Act of 1934" (48 Stat. 337) was passed. Section 3 of this Act (48 Stat. 340, U.S.C., Tit. 31, §442) authorized the Secretary of the Treasury by regulations to prescribe the conditions under which gold might be acquired and held, etc., and section 4 (48 Stat. 340, U.S.C., Tit. 31, §443) provided that gold withheld, acquired, etc., in violation of such regulations should be forfeited to the United States and that the person violating such regulations should be subject to a penalty of twice the value of the gold. Section 5 (48 Stat. 340, U.S.C., Tit. 31, § 315b) provided that all gold coin should be withdrawn from circulation and formed into bars and that "no gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States". Section 6 (48 Stat. 340, U.S.C., Tit. 31, §408a) provided that except to the extent permitted in the regulations of the Secretary of the Treasury, no currency of the United States should be redeemed in gold. By sections 8 and 9 (48 Stat. 341, U.S.C., Tit. 31, §§ 734, 733) the Secretary of the Treasury, with the approval of the President, was authorized to purchase or sell gold "at such rates and upon such terms and conditions as he may deem most advantageous to the public interest". By section 12 (48 Stat. 342, U.S.C., Tit. 31, §821), section 43 of the Agricultural Adjustment Act was amended to provide that the weight of the gold dollar should not "be fixed in any event at more than 60 per centum of its present weight".

On January 31, 1934, the President, by proclamation (31 U.S.C.A., § 821, note) fixed "the weight of the gold dollar to be 15-5/21 grains nine-tenths fine" or approximately 59% of its previous weight.

On February 18, 1935, this Court in *Perry v. United States,* 294 U. S. 330, held the Joint Resolution of June 5, 1933, invalid in so far as it attempted to override the obligation created by gold bonds issued by the United States.

On March 14, 1935, the Secretary of the Treasury issued a "Notice of Call for Redemption before Maturity" of all outstanding First Liberty Loan bonds of 1932-47 (R. 13-14). The notice stated, "All outstanding First Liberty Loan bonds of 1932-47 are hereby called for redemption on June 15, 1935" (R. 13).

This included the bond owned by the respondent which bond, as well as all other bonds of the same issue, provided as follows:

> "All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued to the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. If in any case less than all of the bonds of said series are to be redeemed, the bonds to be redeemed will be determined by lot by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void" (R. 12).

At the time of the issuance of this "Notice of Call for Redemption" on March 14, 1935, the fiscal agents of the United States were not authorized to make payment of such bonds as might be tendered for redemption in accordance with the notice, in gold, but were authorized and directed to make payment thereof only in currency of the United States other than gold (R. 11). Neither at the time of the issuance of the notice nor at the date fixed for redemption were the United States ready, able or willing to redeem the bonds in gold as they had contracted to do. At that time the Gold Reserve Act of 1934 was in force and Section 5 thereof (U.S.C., Tit. 31, § 315b) provided that no gold should be coined and no gold should be paid out or delivered by the United States. On and after June 15, 1935, the United States paid all First Liberty Loan 3½% bonds tendered for redemption pursuant to the notice in currency of the United States *other than gold, but the* Treasury Department refused to pay for the *same* in gold (R. 11). Because of these facts, the respondent did not surrender or present for payment the bond owned by him. Had he done so, the United States would not have paid the same in any manner except by payment of $1000.00 in devalued currency of the United States other than gold (R. 11).

No interest coupons dated December 15, 1935, on the First Liberty Loan 3½% bonds have been paid by the United States (R. 11). Such coupons as were presented for payment were refused payment by the Treasury Department *on the ground* that the bonds to which the same had been attached had been called for redemption (R. 11). The respondent did not present for payment the coupon dated December 15, 1935, attached to the First Liberty Loan 3½% bond owned by him, being the coupon here

in suit, because such presentment would have been a wholly futile act since the United States had already publicly announced their intention not to pay the same (R. 14-16). If the coupon had been presented for payment, payment would have been refused (R. 11).

Accordingly, on December 30, 1935 (R. 1), the respondent filed suit to recover judgment against the United States for the sum of $17.50 (R. 1-6), being the face amount of the interest coupon due December 15, 1935, which the United States refuse to pay. The judgment of the District Court being in favor of the United States (R. 9), the respondent appealed (R. 25) to the Circuit Court of Appeals for the Fourth Circuit. That Court reversed the judgment and the Government brought the case to this Court on certiorari.

THE NATURE OF THE RESPONDENT'S CASE.

The government's brief throughout shows a complete misconception of the nature of the respondent's suit, and throughout its brief the government treats the case as though the situation presented were precisely the same as that presented in the case of *Perry v. United States*, 294 U. S. 330. Because of this fact, we think it essential to first place clearly before the Court the nature of the respondent's case.

The respondent is not seeking in this case to compel the United States to pay his bond or the interest coupon thereto attached in gold or in currency in an amount in excess of the face amount of the bond, or the interest coupon. Indeed, the respondent is not seeking payment of his bond at all. This suit has not been brought to recover the face amount of the bond either in gold or in currency, nor is it brought to recover any sum in excess of

the face amount of the bond. The respondent is perfectly content to hold his bond until its maturity on June 15, 1947, upon payment in the meantime of the interest as it accrues thereon. The United States have paid all interest coupons up to and including the coupon due on June 15, 1935, but they refuse to pay the coupon due on December 15, 1935. It is on that coupon that this suit was brought. The respondent concedes that under the decision in *Perry v. United States,* 294 U. S. 330, he cannot compel payment of the coupon in gold coin, but he does most emphatically contend that he is entitled to payment of the coupon in legal tender currency other than gold.

The contract contained in the coupon is simple and clear. The United States unequivocally promise to "pay to bearer $17.50 for six months interest due on the fifteenth day of Dec. 1935 on $1000. 3½ per cent Bond of Liberty Loan of 1917" (R. 13). The interest coupon is payable in gold coin just as is the principal of the bond, but the respondent is not asking for payment of the interest coupon in gold. He is content to receive $17.50 in legal tender currency. Since the respondent asks for that and nothing more, there could be no question about the matter were it not for the fact that the government contends that the bond to which the coupon was attached was called for redemption and that consequently the coupon is void. In other words, the government in effect pleads confession and avoidance. It sets up an affirmative defense and avers that although it did promise to pay the respondent $17.50 on Dec. 15, 1935, that promise has become void by the happening of a condition subsequent. This the respondent denies, and the only question presented in this case is whether or not the respondent's bond has been validly called for redemption.

Now, the bond does contain a provision authorizing the United States to redeem the bond before maturity and in the event of redemption the obligation to pay interest undoubtedly ceases and the subsequent coupons become void. However, the government and the respondent do not agree as to what is meant by redemption in this case; they do not agree as to just what the condition subsequent is upon the happening of which the subsequent interest coupons become void. The government contends that the only condition which must be complied with is that the United States give to the respondent a three months notice of an intention to redeem. But the bond is payable in gold coin both at maturity and upon prior redemption and such payment in gold coin is a condition which must be complied with in order for the government to avail itself of its option to redeem. It cannot refuse to perform that condition and at the same time demand performance from the one in whose favor the condition runs.

We admit the right of the government to redeem its bond, but we most respectfully urge that it cannot redeem its bond except by the payment of the principal thereof in gold coin. This does not mean that we demand payment in gold. It simply means that the government, so long as it persists in its refusal to pay in gold coin, cannot redeem before maturity. In other words, the respondent contends that the government can redeem his bond only in accordance with its terms, that is to say, upon payment of the principal "in United States gold coin of the * * * standard of value" existing at the time of the issuance of the bond. We do not question the constitutional power of Congress to regulate the currency of the United States, nor do we question the power of Congress over gold as a part of the currency of the United

States. Congress could withdraw gold from circulation and make it impossible for the respondent to receive gold for his bond, but by so doing it placed the government in a position where it could not comply with the condition of the bond and hence could not redeem its bond prior to maturity. The fact that the government in the exercise of its constitutional power withdrew gold from circulation does not excuse it from compliance with the condition precedent to the exercise of its privilege of redeeming its bond prior to maturity.

In making this contention, we are not saying, as the government in its brief implies, that the power of Congress over gold is restricted and that we must be paid in gold coin or be paid some amount in excess of the face amount of the bond, in legal tender currency. We are not asking for payment of the bond in gold, or in legal tender currency, either at its face value or in any amount in excess of its face value. We are not questioning the power of Congress to refuse to pay the respondent gold; we merely question the power of the United States to redeem its obligation except by payment in gold. This does not deprive the government of its power of redemption—that always remains just as it was. It might be onerous for the government to comply with the condition of the bond by paying in gold coin and hence it might not be practicable to exercise the right of redemption under such conditions, but the right is still there.

We admit the government's right to redeem its bond. We say that that right is subject to two conditions, that a valid notice of redemption be given and that redemption be actually made. The government contends that only one condition exists, that is, that a notice of redemption, but not necessarily a notice of redemption in gold, be

given. They deny absolutely that the right of redemption is conditioned upon actual redemption by payment.

Thus it will be seen that the question presented is simply one of construction of the contract between the parties.

ARGUMENT.

I.

PRELIMINARY CONSIDERATIONS.

Although the question presented in this case is solely one of construction of the contract between the parties and the exact question here has never before been presented to this Court for determination, the government nevertheless insists that the whole question presented by this case has already been decided by this Court in *Perry v. United States, supra.* It seems clear to us that such is not the case but we think it would be well to first discuss the decision in that case and the related cases decided at the same time before discussing the specific contract before the Court in this case and its legal effect.

A.

The Gold Clause Cases of 1935.

The so-called "Gold Clause Cases" were three in number: *Norman v. B. & O. Railroad,* 294 U. S. 240; *Nortz v. United States,* 294 U. S. 317; and *Perry v. United States,* 294 U. S. 330. There was a strong dissenting opinion filed by four of the nine Justices covering each of the three cases. The *Norman* case came up on *certiorari* to the Court of Appeals of New York and the *Nortz* case and *Perry* case came up on questions certified by the United States Court of Claims.

The first case, *Norman v. B. & O. Railroad, supra,* presented the question of "the validity of the joint resolution of the Congress, of June 5, 1933, with respect to the 'gold clauses' of private contracts for the payment of money." The majority of the Court held that the joint resolution in so far as it affected the "gold clauses" of private contracts, was valid. The Court first discussed the interpretation of the *"gold clauses" in suit and held* that these clauses fairly construed "were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed." The Court held that the contracts were valid when made, but that Congress had the power under the Constitution to establish a monetary system and invalidate the provisions of existing private contracts which interfered with the exercise of its constitutional authority, and that since there was a reasonable relation between the interdiction of the "gold clauses" *and the monetary policy adopted by Congress,* its action in invalidating the "gold clauses" was not arbitrary or capricious. The Court said:

> "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." (294 U. S. 307).

The second case, *Nortz v. United States, supra,* presented the question as to whether or not the owner of gold certificates of the United States not holding a federal

license to acquire or hold gold coins, was entitled to receive from the United States, upon surrender of such certificates, a sum in excess of the face amount thereof because the world market price of gold at the time of the surrender was in excess of the currency so received. The plaintiff had been required to surrender his gold certificates and accept legal tender currency in an amount equal to his gold certificates. But at the time his certificates had been surrendered, the dollar had not been devalued and the Act of March 14, 1900, fixing the gold content of the dollar at twenty-five and eight-tenths grains, nine-tenths fine, was still in effect, which meant that the domestic price of gold was exactly equal to the currency received. The Court held that since the currency paid to the plaintiff for his gold certificates was on a parity with that standard of value, the plaintiff did not sustain any actual loss, and since the Court of Claims could not entertain a suit for nominal damages, the petition of the plaintiff should have been dismissed.

In the third case, *Perry v. United States, supra,* the question presented was whether or not the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States was "entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond." Since the bond involved in the *Perry* case was very similar to the bond involved in the present case, and since the government insists that the decision in the *Perry* case is controlling in this case, a more careful and extended consideration of the *Perry* case is warranted.

In the *Perry* case, when the bond was presented for payment, the plaintiff demanded its redemption by the payment of ten thousand gold dollars, each containing

twenty-five and eight-tenths grains of gold, nine-tenths fine, or by the delivery of 258,000 grains of gold, nine-tenths fine, or by payment of 16,931.25 gold dollars each containing 15-5/21 grains of gold, nine-tenths fine, or 16,931.25 dollars in legal tender currency. The United States refused to redeem the bond except by the payment of $10,000.00 in legal tender currency. The plaintiff then brought his suit in the Court of Claims to recover the larger amount. In its opinion this Court first considered the meaning of the "gold clause" contained in the bond or, as the Court phrased it, "the import of the obligation". Pointing out that this bond differed from an obligation of private parties or of states or municipalities "whose contracts are necessarily made in subjection to the dominant power of the Congress", and that the terms of the bond were explicit and expressed not only in the bond itself but definitely prescribed by Congress, the Court said:

> "This obligation must be fairly construed. The '*present* standard of value' stood in contradistinction to a *lower* standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government's obligation. We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment." (294 U. S. 348-9)

The Court then considered "the binding quality of the obligation" and after observing that "there is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional au-

thority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers", held that the Joint Resolution of June 5, 1933, "in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power".

The *Perry* case was a suit against the United States on an express contract to recover damages for breach of that contract. The Court of Claims has no jurisdiction of a suit for nominal damages only. Accordingly, unless the plaintiff could show actual damages, he was not entitled to recover notwithstanding the invalidity of the Joint Resolution of June 5, 1933, as applied to his bond. As stated by the Court:

> "Because the Government is not at liberty to alter or repudiate its obligations, it does not follow that the claim advanced by the plaintiff should be sustained. The action is for breach of contract. As a remedy for breach, plaintiff can recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched." (294 U. S. 354-5)

The plaintiff contended that his damages could be computed by comparing the weight of the gold dollar at the time his bond was tendered for redemption with the weight of the gold dollar at the time the bond was issued. The Court, while recognizing that this might be so if gold had remained in circulation, stated that it was not true in fact because gold had been withdrawn from circulation; there was no free domestic market for gold. Accordingly, the Court held that inasmuch as the plaintiff had offered no evidence of actual damage, he could not recover.

It will thus be seen that the question presented to and decided by this Court in the *Perry* case is quite different from the question presented to this Court for determination now. Only two questions were certified to this Court in the *Perry* case, and only the first of these was answered. This question was:

> "1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of $10,000 issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value', entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?"

This Court said, "No." The only question decided was that *under the facts of that case* the plaintiff was not "entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond". But the respondent in the case at bar is suing on a coupon and he has not asked for "an amount in legal tender currency in excess of the face amount of the" coupon. He is not suing for any damages caused by the refusal of the government to pay the bond in gold on the redemption date; nor is he asking for any damages caused by the refusal to pay the coupon in gold rather than in other currency. If the respondent were demanding $29.57 in legal tender currency, the *Perry* case might be in point, but since he is demanding only $17.50, it is clearly not in point. This Court decided that inasmuch as Perry had elected to surrender his bond and sue for damages for breach of contract, but had failed to prove damage, he could not recover. This Court did *not* decide

that Perry's *only* remedy was to surrender his bond and sue for damages for breach of contract. The question whether the obligation of the United States to pay interest ceased upon the giving of a notice of redemption without any intention to pay in gold was not considered by the Court. The only provision of the bond construed by the Court was the clause requiring payment in gold. The clauses as to the payment of interest, the meaning of which is here presented to the Court for determination, were not even quoted or referred to in the opinion of the Court in the *Perry* case, much less construed by it.

If payment in gold or an honest intention to pay in gold, was a condition precedent to redemption, and we strongly contend that it was, then the respondent had a right to refuse to surrender his bond except upon a strict compliance with that condition and the question as to whether or not the failure to comply therewith caused him damage was entirely immaterial.

The government reserved to itself an option to redeem its Liberty Bonds prior to maturity. It gave notice that it would redeem, not in accordance with its contract, but on its own terms. The plaintiff in the *Perry* case elected to treat the government as having exercised its option and sued for damages for its failure to do so in accordance with the terms of its contract. The respondent, on the other hand, as we contend he had every right to do, elected to treat the government as having failed to exercise its option. The two cases are manifestly quite different.

B.

The Contract Is Governed By Ordinary Legal Principles.

As will readily be seen from the above discussion, the only substantial question in this case arises out of the interpretation of the contract in suit and for that reason it is necessary to keep always in mind three important and fundamental rules of construction.

First, the contract should be so construed as to effectuate its general purpose, to give effect to the intention of the parties, and to give their ordinary meaning to the words used.

1 Restatement of The Law of Contracts 319, Sec. 235
3 Williston on Contracts (1936) 1777, Sec. 618
2 Elliott on Contracts, 778-781, Secs. 1508, 1509
13 C. J. 531, Tit. "Contracts", Sec. 489

Second, in cases of ambiguity, a contract should be most strongly construed against its author.

> "Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."
>
> 13 C. J. 544, Tit. "Contracts", Sec. 516

> "If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant,

upon the general ground that a party, who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."

Noonan v. Bradley, 9 Wall. 394, 407.

See also:

Garrison vs. United States, 7 Wall. 688
Marietta Mfg. Co. v. United States, 73 Ct. Cls. 528
Gibbons v. United States, 15 Ct. Cls. 174
1 Restatement of The Law of Contracts 328, Sec. 236
3 Williston on Contracts (1936) 1788, Sec. 621
2 Elliott on Contracts 807, Sec. 1528.

Third, when contracts are optional in respect to one party, they are strictly construed in favor of the party bound and against the party who is not bound.

3 Williston on Contracts (1936) 1788, Sec. 620
2 Elliott on Contracts 833, Sec. 1548
Pyrate Corp. v. Sorensen, 44 Fed. (2d) 323
Rutledge &c Coal Co. v. Mermod, 237 S. W. 849 (Mo.)
Frank Oil Co. v. Belleview Gas & Oil Co., 119 Pac. 260 (Okl.).

These same general rules of construction are applicable to the contract in this case because the United States are as much bound by their contracts as are private individuals. The same ordinary legal principles govern their contracts as govern the contracts of other persons.

"Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the

United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. * * * When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals * * *. Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit *of public* as well as private debtors."

Lynch v. United States, 292 U. S. 571, 579.

"When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference * * * except that the United States cannot be sued without its consent."

Perry v. United States, 294 U. S. 330, 352

"When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments."

United States v. Bank of The Metropolis, 15 Pet. 377, 392.

See also:

United States v. National Exch. Bank, 270 U. S. 527, 534
Reading Steel Casting Co. v. United States, 268 U. S. 186, 188
Hollerbach v. United States, 233 U. S. 165, 171
United States v. Smith, 94 U. S. 214, 217
Cooke v. United States, 91 U. S. 389, 396
Vermilye & Co. v. Adams Exp. Co., 21 Wall. 138, 144
Garrison v. United States, 7 Wall 688, 690
The Floyd Acceptances, 7 Wall. 666, 675.

C.

The Power of the United States to Issue Callable Bonds or Otherwise Manage the Public Debt Is Not at Issue.

In its brief the government states that this case, unlike the *Perry* case involves a consideration of the power to manage the public debt. It is said that the power of the United States to call its obligations for redemption prior to maturity is essential to the proper management of the public debt and the government's brief contains a lengthy discussion of the "Role of Callable Bonds in Public Finance" (pp. 21-33). It is then announced that a decision in favor of the respondent in the present case would seriously affect government financial operations.

We do not challenge the right of the United States to manage the public debt or to redeem their bonds in accordance with their terms. It may very well be that a decision in favor of the respondent would seriously affect *government financial operations* but that depends on the nature of such operations.

Much stress is laid upon the fact that the government can save considerable money by calling its gold bonds and issuing new bonds at lower interest rates. All of this is doubtless true, but it is beside the point. The government no doubt now has, or at least in times past has had, bonds outstanding which it could not call for redemption although if it had had that right it could have saved large sums of interest. But who will contend that the government therefore acquired a right of redemption it never had? In its brief (p. 27) the government refers to the fact that between 1889 and 1891 the Treasury paid premiums aggregating $48 millions in order to retire prior to the first optional redemption date, some $270 millions of outstanding bonds. Could anyone possibly

contend that the government thereby acquired a right of redemption prior to the first optional redemption date specified in the bonds? Such a contention would be absurd, and yet in its essence that is exactly the contention which the government is now making. In effect they are saying we cannot pay in gold; circumstances have altered. Unless it redeems, the government will lose large sums of money through the payment of excessive interest charges. Consequently, the government acquires a right of redemption it never had—it acquires a right to redeem without paying in gold. What is the essential difference between contending that the government can thus acquire a right to redeem without complying with the condition of the bond, and the contention that the government, because interest rates at any particular time may be more advantageous, can acquire a right to redeem a bond before the first optional redemption date specified in the bond? Manifestly, there is no difference. The same argument, in exactly the same words, and with exactly the same basis could be made in support of a contention that the government, if the situation of the money market were favorable, could redeem any of its bonds prior to the first optional redemption date. Perhaps it is unfortunate that the government, because of present circumstances, cannot exercise its right of redemption, but no more unfortunate than if the bonds had been made callable after 20 years instead of after 15 years. In 1917 it was deemed expedient to make the bonds payable in gold; their marketability was thus enhanced and premiums were paid for the bonds which would not have been paid had the bonds not been payable in gold. Perhaps it would have been wiser to have made the bonds redeemable in currency other than gold, but at the time the bonds were issued it seemed expedient to make them

redeemable in gold. The price realized for the bonds was doubtless higher than that which would have been realized had the bonds not been redeemable in gold. Having obtained the advantage resulting from the fact that the bonds were made payable in gold, the government cannot be permitted to disregard the obligation to pay in gold merely because it might be inconvenient to pay in gold at the present time.

II.

THE RIGHT TO REDEEM DEPENDED UPON THE PERFORMANCE OF TWO CONDITIONS, NEITHER OF WHICH WAS IN FACT PERFORMED, ALTHOUGH STRICT PERFORMANCE OF EACH WAS REQUIRED.

A.

An Exact Compliance With the Conditions Attached to a Right of Redemption Is Necessary.

Unless there is an express provision giving a right of prepayment, the obligor on a bond has no right to prepayment. The right to continue to receive interest is a valuable right of which the obligee will not be deprived except strictly in accordance with his contract. It is well settled that in order to avail himself of a right of redemption reserved to him, the obligor must strictly comply with the condition expressed in the bond.

6 Fletcher Cyclopedia of Corporations (Perm. Ed.) 592, Sec. 2731
2 Jones on Bonds (4th Ed.) 210, Sec. 756
Columbia G. & E. Co. v. Knickerbocker Trust Co., 136 N. Y. S. 840
Corbett v. McClintic-Marshall, 17 Del. Ch. 165.

In *Lesman v. Mich. Pen. Car Co.*, 63 N. Y. S. 999, a mortgage provided that bonds should become due upon "any sale of property". The Court in holding that this

meant sale in foreclosure and not a voluntary sale by mortgagor said, p. 1002:

> "If there be any doubt (which we do not think there is) as to what sale was referred to by the use of the words 'any sale' in the ninth clause, then that construction must be adopted which is most favorable to the bondholders, and one which will not impair their security in any way. The defendant obligated itself to pay the principal secured by the bonds on the 1st day of September, 1942; and, under the mortgage securing the payment, it has no right, against the objection of a single bondholder, to pay in advance of that time. The bondholders have a right to insist that defendant shall carry out its contract; that it shall pay its bonds when it agreed to and not before; and that in the meantime the interest shall be paid at the times stipulated."

See also:

Harnickell v. Omaha Water Co., 131 N. Y. S. 489.

In *Sterling v. H. F. Watson Co.*, 88 Atl. 297, (Pa.) a corporation had the right to redeem its preferred stock by payment for the same at par and accrued dividends. The Court held that the corporation could not set off against the redemption price stock dividends previously paid and said, p. 298:

> "It was so stipulated in the contract with the preferred shareholders, and they have the right to insist upon performance according to the terms of that contract."

In holding that the numbers of the bonds purchased and owned by the corporation issuing the same would have to be "put into the hat" when the drawing was made to determine which of the bonds originally issued

were to be called for redemption, the Court of Appeals of New York said:

> "When the bonds in question were issued and negotiated, each bond had an equity represented by the chance that it might not be drawn by lot for redemption until it became payable in 1903. As the bonds drew a high rate of interest, that equity was valuable, and *each bondholder had the right to insist that his bond should not be redeemed except in strict accordance with the contract contained in the mortgage*" * * *
>
> "*They have the right to have their bonds redeemed only according to the contract, and, unless they are so redeemed, to hold them and draw interest upon them until the day of payment shall arrive.* It is only by putting all of the numbers but three in the hat and making one drawing up to date, and subsequent drawings on the same basis, that the 187 bonds outstanding will have their equities preserved, and suffer only the chance of redemption that the sinking-fund clause provides."
>
> Mo. Rwy. Co. v. Union Tr. Co., 51 N. E. 309, 311-312 (N. Y.) (Italics ours)

In *Randolph v. Middleton,* 26 N. J. Eq. 543, a statute passed after the issue of the bonds in suit provided for sales in insolvency cases free from prior liens. The decree appealed from directed that the property be sold free from the lien of mortgages and provided for the payment of the mortgage bonds out of the proceeds of sale. The Court held that the maturity of the bonds could not be anticipated by sale and that the statute could not alter the provisions of the bonds. The Court said p. 546:

> "It is certain, in a contract for a loan of money, the time fixed for repayment is a material matter, so that to hasten or postpone such period is to alter such contract in point of substance. If I lend a sum

> of money on a credit of ten years, it seems certain that I cannot be compelled to accept repayment at any period short of the time so fixed, by force of any legislative act which can be subsequently framed."

In *Chicago & I. R. v. Pyne,* 30 Fed. 86, the mortgage provided for a sinking fund of earnings of the mortgagor "for ultimate redemption" of the mortgage bonds, but no definite date of redemption prior to maturity was fixed. The company sought to redeem the bonds as soon as the sinking fund was large enough for that purpose. In denying the right of redemption before maturity, the Court said, p. 90-91:

> "If it were necessary, the rule of interpretation might be invoked that, where doubt exists as to the construction of an instrument prepared by one party, upon the faith of which the other party has parted with his money, that construction shall be adopted which will be favorable to the latter. Noonan v. Bradley, 9 Wall. 395. But it is not necessary to rely upon this rule of construction of contracts. * * * It is not to be supposed that the Chgo. & Iowa Co. designed to ingraft conditions upon the bonds which would make them less desirable for the class of investors who purchase such securities, and thus impede their negotiation upon the best terms. Such would indubitably be the effect of the contract if it were to be read as is now insisted by the complainants, because it would require the bondholders to accept payment, and surrender their investments, at a time which they could not foretell, and depending wholly upon the contingencies of the traffic contract between the two railroad companies.
>
> "* * * The contract should therefore be construed as intended to strengthen and fortify the bonds, and not as intended to require the bondholders to surrender their investment at an earlier time than is provided for in the bonds."

Likewise, in Texas & Pacific R. R. v. Marlor, 123 U. S. 687, it was held that where an obligor had the option to pay interest coupons in scrip if its earnings were not sufficient to enable it to pay in cash, but failed to notify the bondholders of its election to exercise its option to pay in scrip on or before the due date of the coupons, the obligor cannot thereafter elect to pay the coupons in *scrip but must* pay in cash.

It will be noted that in none of the cases cited did the Court hold that upon the failure of the obligor to comply with the condition attached by the contract to his right of redemption, the only remedy of the bondholder was a suit for damages. On the contrary, the Court in each instance held that the right of redemption could not be exercised because the condition attached to that right had not been strictly complied with. There was no inquiry as to whether a failure to comply with the condition would cause damage to the bondholders. The question of damages was entirely immaterial.

The government attempts to distinguish the cases cited by saying that in those cases the call was in terms to pay something less than was due, whereas in the present case the call "bound the government to perform whatever its obligation required it to perform". But the point is that something *different* was tendered. It makes no difference whether what was tendered was more or less than what was due. Only the fact that it was *different* is important.

In the case at bar the government contends that it has exercised its right of redemption and complied with the conditions attached to that right. But, as said by this Court in the *Perry* case "the terms of the bond are explicit" (294 U. S. 348). It provides: "The principal

and interest of this bond shall be payable in *United States gold coin* of the present standard of value". The statute pursuant to which the bonds were issued (40 Stat. 35) and the general law (U.S.C., Tit. 31, §768) likewise required payment of both principal and interest in gold coin. There was no provision for payment in any other kind of money or in any other medium, and of course payment in gold coin was required upon redemption just as well as at maturity.

This obligation to pay in gold coin Congress recognized but attempted to repudiate by the Joint Resolution of June 5, 1933. This Court held that this could not be done and that in so far as it attempted to override the obligations of the United States, the Joint Resolution was a nullity. Consequently the provisions of the bond remain unaltered and the United States are clearly obligated to pay the respondent $1,000.00 in gold coin in order to redeem his bond.

Perry v. United States, 294 U. S. 330.

The government contends that the giving of a notice is the only condition attached to the right of redemption but actually there are two conditions attached to the right of redemption, the one a condition precedent and the other a concurrent condition. The provision requiring the giving of a notice of redemption was the condition precedent. The requirement that the principal be paid in gold coin was the concurrent condition. Under the rule laid down by the cases above referred to, strict compliance with both conditions was required. But the fact is that there was compliance with neither condition. Consequently, the respondent's bond was not redeemed on June 15, 1935.

B.

The Notice Issued on March 14, 1935, Was Not a Valid and Bona Fide Notice Such as Was Contemplated in the Bond.

The right of the government to redeem the respondent's bond was expressly conditioned upon the publication of a notice of redemption three months in advance of the redemption date. The government concedes that publication of a notice was a condition precedent to the right of redemption but contends that the notice issued on March 14, 1935, was a substantial compliance with that condition. But substantial compliance is not sufficient. Under the authorities there must be *strict* compliance. And whatever else may be said of the notice of March 14, 1935, it was certainly not a strict compliance with the condition expressed in the bond.

The contract provides that the bonds may be "*redeemed and paid* at the pleasure of the United States * * * at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date * * *." Now, what kind of a notice is required by this language of the bond? Obviously, a notice that the bond will be "*redeemed and paid* * * * at the face value thereof". And since the only medium of payment provided for in the bond was gold coin, it is clear that the notice required in order that the respondent's bond could be redeemed on June 15, 1935, was a notice that on that date the bond would be redeemed by the payment of $1,000.00 in gold coin of the United States of the standard of value existing on June 15, 1917. Can there be any doubt that such was the condition expressed in the bond? We think not, but if there is any doubt, then such doubt must be resolved in favor of the appellant because the language used was the language

of the government and because the right of redemption was optional in favor of the government. (See authorities cited, supra, pp. 20-21). And even if the language were not so clear, reason and justice would require that the notice to be issued be a *bona fide* indication of the intention of the government to do that which it was admittedly bound to do—redeem by payment in gold coin.

Now was this condition strictly complied with? Was a *bona fide* notice published? The notice of March 14, 1935, was most certainly not a notice that the bond would be redeemed by the payment of $1,000.00 in gold coin. We cannot close our eyes to the fact that it was actually a notice of payment in depreciated currency—not in gold coin as required by the bond. At the time the notice was issued the government had not the slightest intention of paying in gold coin on the redemption date. Gold coin had been withdrawn from circulation and the currency had been devalued. The Secretary of the Treasury had publicly announced that the gold coin would not be paid. Congress had passed the Joint Resolution of June 5, 1933, declaring that no payments should be made in gold coin and attempting to abrogate the gold clause in government bonds. The Resolution declared that no provision giving to the obligee a right to require payment in gold coin "shall be contained in or made with respect to any obligation hereafter incurred". Theretofore all holders of gold had been required, under threat of a penalty, to surrender all gold to the United States. As early as January 30, 1934, Congress had required that all gold coin be withdrawn from circulation and melted into bars and that "no gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States." Fiscal agents of the government were not authorized to pay in gold, but were directed to make payments of bonds

tendered for redemption only in currency other than gold (R. 11). And when bonds had been presented and payment in gold demanded, it had been refused (R. 11).

It is true the notice did not specifically state that the bonds would not be paid in gold. Neither did it state the bonds would be paid in gold. But how could the Secretary of the Treasury give a notice that bonds of the United States would be redeemed and paid in gold coin when the laws of the United States provided that no gold should be coined or paid out, or delivered by the United States? In the light of these facts, can it be said that the notice was anything more than a notice that the bonds would be paid only in depreciated currency? And yet the bonds were payable in gold coin. How can it be said that such a notice complied with the contract? How can it be said that the condition precedent, strict compliance with which is required by law, has been complied with at all?

Suppose on March 14, 1935, the Secretary of the Treasury had published a notice to the effect that on June 15, 1935, the 3½% Liberty Bonds would be redeemed by payment of $500 for every $1,000 bond. Could it be said that this would have been a valid notice of redemption under the contract any more than a notice published two months before the redemption date instead of three months as required by the bond would be a valid notice? Manifestly not. And yet this is just what was done. The government indicated that it would pay in depreciated currency but not in gold coin.

The comparative values of the gold dollar and the depreciated dollar are not in controversy. The respondent bargained for gold coin, not paper money. The bond clearly required a notice of redemption in gold coin. And

although the notice did not specifically state in so many words that payment would not be made in gold coin, it surely did in substance in view of the surrounding circumstances. Whether gold was worth more or less than the depreciated currency was entirely immaterial. The condition precedent must be strictly complied with before the respondent can be required to surrender his bond.

In the lower Court the government argued that the Court could not go behind the language of the call and that a notice was sufficient which did not say or mean to say that the bonds would be redeemed in gold coin. This argument is now abandoned and it is now argued that the notice did not commit the United States definitely to payment of either gold coin or legal tender currency. It is said that the notice was intended as a notice that the United States would pay whatever they were obligated to pay and that it should be so construed. In other words, if the United States were obligated to pay in gold coin, then the notice was a notice of payment in gold coin; if the United States were obligated to pay in legal tender currency in an amount in excess of the face amount of the bond, then the notice was a notice of payment in legal tender currency in some indeterminate amount in excess of the face amount of the bond. But this is a mere equivocation and it does not square with the facts. If ever anything were certain, it is that the notice of March 14, 1935, was intended as a notice to pay the face amount of the bonds mentioned in legal tender currency and nothing more.

How can it possibly be said that if the government were obligated to pay in gold coin, then the notice was a notice of payment in gold coin? There was no gold

coin in existence. Time and time again it had been announced that no gold coin would be paid. The Gold Reserve Act of 1934 expressly prohibited the Secretary of the Treasury or any other fiscal agent of the United States from paying gold coin for any purpose whatsoever. In addition to this, the Joint Resolution of June 5, 1933, specifically provided that any obligation which purports to give the obligee a right to require payment in gold is against public policy "and no such provision shall be contained in or made with respect to any obligation hereafter incurred". Prior to March 14, 1935, the United States were under no obligation to pay the respondent's bond on June 15, 1935, and any action which matured that bond prior to June 15, 1947, created a new obligation. Is the Secretary of the Treasury omnipotent? Could he override the will of Congress and obligate the United States to pay the respondent's bond in gold coin on June 15, 1935, when Congress had said that no such obligation should be incurred? Could he pay the respondent gold coin when Congress had said he should not do so? Merely to state the proposition shows its absurdity.

As said by the lower Court (R. 31):

> "When the Secretary of the Treasury has been forbidden by law to pay gold out of the Treasury and has been required to discharge bonds tendered for redemption with currency based on a 15-5/21 grain dollar, it is idle to contend that a notice to redeem means that he stands ready to redeem in accordance with the promise of the bond, i. e., in gold coin based upon a 25-8/10 grain dollar."

And the same answer might be made to the contention that the notice of redemption, if necessary, might be construed as a notice to pay in legal tender currency

in an amount in excess of the face amount of the bonds. For not only does the Joint Resolution forbid the creation of any obligation payable in gold coin, it likewise forbids the creation of any obligation giving to the obligee a right to payment of an amount of money measured by gold. Could the Secretary of the Treasury disregard this prohibition placed upon him by Congress? Of course not. And the Secretary of the Treasury never attempted to do so. The circular issued by him with the notice of March 14, 1935, expressly states that the bond will be paid at par. Since payment in legal tender currency only was contemplated, how can the notice possibly be construed into a notice of an intention to pay something in excess of par?

The Government's own brief shows the fallacy of the argument. There (p. 40) it is indicated that although the Secretary of the Treasury was not authorized to pay the bonds otherwise than dollar for dollar in legal tender currency he might have been able to pay in gold coin or in legal tender currency in an amount in excess of the face amount of the bonds if there had been "an authoritative determination" that the bondholders were so entitled. This was at best a tender of a law suit; it was certainly not a tender of gold coin. And even if there had been "an authoritative determination" that the bondholder was entitled to gold coin and a judgment rendered for the amount of his bond in gold coin it would not have been paid because the Gold Reserve Act of 1934 prohibits the payment of gold coin in satisfaction of a judgment just as it prohibits the payment of gold coin for any other purpose.

We do not contend, as the government argues, (Brief pp. 38-39, 42-43) that under no circumstances could a call

for redemption offer to pay whatever the obligor was obligated to pay. In the ordinary case it might be possible to make such a call and in that event the amount due could be determined by a suit on the principal obligation. But that is not the situation presented here. The whole point is that the notice in this case, when read in the light of the existing statutes, very definitely tendered a particular amount and mode of payment, different from that contracted for.

Nor did the decision in the *Perry* case "conclusively establish" that the call was sufficient "to subject the United States to an accelerated liability to the full extent of its obligation". As the government in its brief points out (p. 70), the claimant in the *Perry* case did not question "the right of the government to discharge its obligation by payment in legal tender currency". As a matter of fact, the call in the *Perry* case was made before the passage of the Gold Reserve Act of 1934 and before the devaluation of gold and neither the form of the notice nor the provision of the bond respecting redemption were before the Court. The question was not certified by the Court of Claims and it was not referred to in the briefs of opposing counsel or mentioned in any of the opinions. How can it be said that the *Perry* case conclusively established the validity of the call when the question was not even considered?

We respectfully submit that the notice issued on March 14, 1935, was not a notice in accordance with the contract. It was certainly not a strict compliance with the condition precedent and the respondent had a legal right, under the circumstances, to treat it as a nullity.

C.

The Interest Coupons Did Not Become Void Except Upon Actual Redemption of the Bond by Payment in Gold Coin.

Even if it could be said that the notice issued on March 14, 1935, was a sufficient notice to entitle the government to redeem the respondent's bond on June 15, 1935, the fact remains that it was *not redeemed* by payment in gold coin nor was there any willingness to redeem in gold coin. The government acknowledges that the respondent may have a right to receive gold coin and admits that if so, it has broken the contract by refusing to pay in gold coin and that in such event, it is liable for damages for such breach (as indeed it must under the decision in the *Perry* case), but contends that even though payment in gold coin were required, it was not a condition and failure to pay in gold coin did not prevent redemption. This is not the case.

The requirement that upon redemption the principal of the bond be paid in gold coin was clearly a concurrent condition to redemption. Without strict performance of the condition there could be no redemption. Not only is the intention of the parties as gathered from the entire contract clear that payment is a concurrent condition to redemption, but such is expressly provided.

The bond provides that any of the bonds may be "*redeemed and paid* at the pleasure of the United States". The expression used is "redeemed *and* paid"; the two are synonymous. In the very clause which gives the right of redemption, the condition upon which that right depends is *expressly* inserted. The bond provides for payment in one medium and one medium only—gold coin. It is abundantly clear, therefore, that the government's right of redemption is expressly conditioned upon payment in gold coin.

Even if there could be any doubt as to payment in gold coin being a condition to redemption, the general rule of interpretation would remove all such doubt since even the government admits that under the contract payment in gold coin may be due on the date of redemption. The rule is stated in 1 Restatement of The Law of Contracts, 386, sec. 267, as follows:

> "Promises for an agreed exchange are concurrently conditional, unless a contrary intention is clearly manifested, if the promises can be simultaneously performed and the parties can be assured that they are being so performed, where by the terms of the promises
>
> (a) the same time is fixed for the performance of each promise; or
>
> (b) a fixed time is stated for the performance of one of the promises and no time is fixed for the other; or
>
> (c) no time is fixed for the performance of either promise; or
>
> (d) the same period of time is fixed within which each promise shall be performed."

And again:

> "Since concurrent conditions protect both parties, courts endeavor, so far as is not inconsistent with the expressed intention of the parties, to construe performances of mutual promises as concurrent conditions."
>
> 3 Williston on Contracts (1936), p. 2333, Sec. 835.

See also:

Bank of Columbia v. Hagner, 1 Pet. 455, 464-5
Dunn v. Oneida Community, 177 Fed. 540
Phillips &c. Const. Co. v. Seymour, 91 U. S. 646, 650.

And the condition is one implied in fact as distinguished from one implied in law with which in some cases a substantial instead of a strict compliance may be sufficient. The rules above quoted are rules of interpretation and once ascertained, the intent of the parties must be given effect.

1 Restatement of the Law of Contracts, §253.
3 Williston on Contracts (1936) pp. 1921-2, §§668, 669.

Now, if this be so, the respondent is clearly right in treating as a nullity the attempted redemption by payment in devalued currency. If payment in gold coin is required, such payment is a concurrent condition which has not been performed and it makes no difference whatsoever that the respondent has or has not been damaged by failure to perform that condition. The fact that gold was not obtainable was no excuse, because in the first place it was unobtainable only because the United States chose to make it unobtainable, and in the second place the fact that performance of a condition is impossible does not give one the right to ignore the condition and demand performance from the other party. Failure to strictly perform the condition absolutely defeats the right of redemption and the questions of damage and impossibility of performance are entirely immaterial. This rule is not only supported by authority, but it is inherently fair and just.

> "So long as the basis of contractual obligation is the expressed intent of the parties, the boundaries of a promisor's liability must be fixed by the terms of his promise. Where, therefore, A promises B to do something if a certain contingency happens or if B renders some performance, there is no breach of promise, and logically, therefore, no liability unless

that contingency happens or that performance is rendered, even though this result is due to no fault of the promisee and could not have been prevented by him."

Williston on Contracts (1936), Vol. 3, p. 2269, sec. 808.

"As a general rule conditions which are either expressed or implied in fact must be exactly fulfilled or no liability can arise on the promise which such conditions qualify. The reason for this is obvious. The promisor can only be held liable according to the terms of the promise which he makes. If he promises five dollars, he cannot be made to pay $5.01. For the same reason if he makes a promise to do an act on condition that he receives $5.01 he cannot be required to perform on being paid $5. The condition is part of his promise qualifying and limiting it, and his promise as a matter of plain fact is not broken until the condition has happened or been performed. * * * Similarly insurance policies, building contracts, contracts of sale, and other contracts, frequently contain express conditions which must be exactly performed in order to create liability on the contract; and the fact that non-performance of the condition or incomplete performance of it has caused no injury to the promisor is immaterial."

Williston on Contracts (1936), Vol. 3, pp. 1940-1941, sec. 675.

"Concurrent conditions are in legal effect mutual conditions precedent. Therefore, if each party fails to comply with the condition qualifying the other's promise, neither can acquire a right upon it, and if by lapse of time fixed by the contract, or of an unreasonable time if no time was fixed, the conditions become impossible of performance, the contract is discharged."

3 Williston on Contracts (1920), p. 3348, sec. 1970.

"It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. * * * A judgment for failure to perform against one party in favor of the other, when the latter was the first delinquent, is offensive to the sense of righteousness and fair dealing."

Mut. Life Ins. Co. v. Hill, 193 U. S. 551, 559.

"Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfill the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform."

Jones v. U. S., 96 U. S. 24, 27.

"* * * Where the stipulations of a contract are interdependent, a defendant cannot be sued for the non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed."

The Tornado, 108 U. S. 342, 351.

"Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered, before that party can sustain a suit against the other. There is no doubt that in this class of contracts, if a day is fixed for performance the party whose duty it is to perform or tender

> performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party."
>
> Phillips &c. Constr. Co. v. Seymour, 91 U. S. 646, 650.

We have been able to find but one case (*Gordillo v. Weguelin*, 5 Ch. Div. 287, discussed *infra* pp. 51-53) which presents a situation exactly like that presented in the case at bar. This is to be expected because, of course, a situation in which an obligor of a bond would call a bond for redemption and then refuse to make payment thereof is very unlikely to arise. In effect, however, the bond gives to the government an option to redeem upon payment of the principal in gold coin and while this is not a suit for specific performance, nevertheless the government, by asking the court to hold that the coupon sued on became void on June 15, 1935, is in reality asking for specific performance of its option agreement. For this reason some cases dealing with options to purchase real estate may be helpful inasmuch as the same principles are applicable. The general rule is well settled and is stated clearly in 58 C. J., 1103, Tit. "Specific Performance", sec. 376, as follows:

> "If by the terms of an option, payment of the whole or part of the consideration is intended to constitute the act of acceptance, not only is it essential that the consideration for the resulting contract be paid or tendered, so as to vest the equitable estate in the purchaser, but the time of such payment or tender is essential, and in accordance with general rules payment must be made within the time stipulated in the option or within valid extensions thereof."

In *Hunt v. Bassett,* 168 N. E. 783 (Mass. 1929), a lessee had an option to purchase the leased premises during the term. He had negotiations with the landlord as to the purchase during the term and tendered a note secured by a mortgage as a down payment. He did not, however, tender the whole purchase price nor prove that during the term he had been ready and willing to do so. Upon the landlord's refusal to convey the property, he brought suit for specific performance. In denying specific performance, the Court said, p. 784:

> "If the plaintiff has so exercised his rights under the option so as to be entitled to a conveyance of the property, the payment of money by him and the delivery of a deed by the defendant would occur at the same time. The conditions are concurrent and mutually dependent. In such a case it is not necessary for the plaintiff to make an actual tender of the purchase money until he receives the deed and it is not necessary for the defendant to deliver the deed until he receives the purchase price. But if the plaintiff did not tender the purchase price he was bound to prove at least that he had offered and demanded performance within the terms of the lease and also, apart from waiver, that he was within the term ready, willing, and able to carry out his part of the transaction."

In *Richardson v. Hardwick,* 106 U. S. 252, 255, it was said:

> "In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound."

In *Lau v. McKechnie,* 168 N. W. 438 (Mich.) a lessee had an option to purchase the leased premises during the term for a stipulated price. Three days before the

end of the term he notified the lessor that he was exercising his option and on the last day of the term he sent the lessor a check for $100.00 to be applied on the purchase price. The Court said, p. 440:

> "By the terms of the option, plaintiff was given the privilege of purchasing the premises for a stated sum within a stated time. The language of the option contemplates a cash payment within the life of the lease. The mere announcement by plaintiff within the time that he was ready to purchase the property is not enough. He was not given the privilege of purchasing the property if he signified his acceptance of the offer before the expiration of the lease, but was given the privilege of purchasing it. He must be something more than ready to purchase; he must actually purchase it before the lease expires by paying or tendering the consideration. For his failure to do so he must be denied relief. * * *"

Likewise in the case at bar the government was not given the privilege of signifying its intention to redeem the respondent's bond, but was given the privilege of redeeming it. And it should also be noted that in this case, as in the case at bar, a part payment only was tendered. But the Court did not say that the option had been exercised and that the only remedy of the lessor was a suit for damages. On the contrary it was definitely decided that all rights under the option had been lost.

In *Ranelagh v. Melton*, 2 Dr. & Sm. 278 (High Ct. of Chan. 1864) the plaintiffs were lessees under leases containing an option to purchase within a seven years' period upon the giving of a three months' notice to the lessor. The seven years' period expired on June 24, 1863. On March 20, 1863, the required notice was served on the lessor but nothing further was done until July 1st

when the plaintiffs' solicitor sent the defendant draft conveyances for his perusal. The defendant refused to complete the sale. In refusing to grant specific performance, the Court said, p. 282:

> "The Court regards it as a case of a condition on the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without its being performed prevents him from claiming the benefit. Applying that rule to the present case; if the agreement fixes a day for payment of the money, then it is clear that if that day is past without the payment, the right to compel a conveyance is lost."

In none of these cases was there any inquiry as to whether the failure to perform the condition had caused damages to the other party. And yet is not the situation in these cases essentially the same as in the case at bar? The government had an option to redeem conditioned upon payment. Or, looking at it in another way, the bondholder agreed that upon payment in gold coin on the redemption date, he would surrender his bond and subsequent coupons would become void. But the government seeks to redeem without payment. It, in effect, asks for specific performance of its option agreement without performing the condition upon which it is predicated. This it is not entitled to have.

The government contends that by the agreement the obligation to pay interest was to cease upon the issuance of a notice of call and the passage of time to the date designated in such notice. It is said that by the terms of the bond, the United States were obliged to pay interest only until the principal became "payable", that the notice of

call for redemption made the principal "payable" and hence terminated the obligation to pay interest; it is also said that by the terms of the bond the United States were obliged to pay interest only "until the date of redemption designated", that the notice issued by the Secretary of the Treasury designated a date of redemption, and that accordingly interest ceased on that date and subsequent coupons became void.

But such reasoning as this completely ignores the very obvious intention of the parties as expressed in the language used in the bond. The contract is not construed; it is destroyed.

As said by the Court of Appeals of New York in *Atwater & Co. v. Panama R. Co.*, 159 N. E. 418, 419:

> "Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish. • • • The Court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance, and a sensible meaning of words should be sought."

The bond provides: "The United States • • • promises to pay to the bearer • • • interest at the rate of 3½ per centum per annum payable semi-annually • • • until the principal hereof shall be payable • • •". In the very next sentence the bond provides that the "principal and interest of this bond shall be payable in United States gold coin • • •". Clearly then the United States

has promised to pay interest until the principal of the bond shall be payable in gold coin of the prescribed standard.

When the bond as a whole is considered, it seems obvious that it was intended as a definite obligation of the United States to pay interest so long as they had the use of the bondholder's money. When the bonds were issued, no one supposed that the United States could terminate their obligation to pay interest except by tendering payment of the principal in accordance with the terms of the bond. And yet if our opponents' contention be correct, the United States could terminate this solemn obligation at any time by the simple expedient of issuing a notice of redemption. It makes no difference, they say, that the notice is not *bona fide,* that the United States, at the time they issued the notice, had no intention of paying in gold coin, and that on the day of redemption they refused to pay in gold coin. If this be true, it logically follows that the United States could announce that they would pay only $500.00 for each $1,000.00 bond or, indeed, announce that they would pay nothing for each bond, yet, if the notice issued, interest ceased. But, our opponents answer, if this were done, the bondholder could sue, and, if he prove damage, recover the amount of his damage. This is no answer at all.

As pointed out by our opponents, the United States are not liable for non-contractual interest (Angarica v. Bayard, 127 U. S. 251, 260; Seaboard Airline Ry. v. U. S., 261 U. S. 299, 304; U. S. v. North Am. Co., 253 U. S. 330, 336) so that even if the bondholder could sue for damages and recover, he could not recover interest. If the government's contention be correct, the bondholder could be completely deprived of his

interest, the only real inducement for purchasing the bond. And yet they say that this is the meaning of the contract.

Suppose, instead of issuing a notice of call for redemption, the United States had simply announced that after June 15, 1935, First Liberty 3½% bonds should bear interest at 2⅞%. Would anyone have contended that the United States were within their rights in thus arbitrarily reducing the interest rate? And yet that is exactly what has been attempted here. The only difference is that here the same purpose is sought to be accomplished indirectly. Of course the United States have a perfect right to accomplish this purpose by *actual redemption in accordance with the terms of the bond*. But this they have not done. If they can redeem by payment in currency other than gold coin, then they should be able to redeem by payment in any medium—as for instance, by offering a 2⅞% bond in payment. Our opponents would argue, we suppose, that in such a case the bondholder would be remitted to a suit for damages. And if the market value of the new 2⅞% bond should be the same as the old 3½% bond, there could be no recovery. The bondholder would have his 2⅞% bond but no more. Or suppose the government should decide to redeem 3½% bonds, payable in 1947, and offer in payment therefor 3½% bonds payable in 1945. The market price of the two bonds might very well be the same so that the bondholder would sustain no provable damage. Could it be said that he would be forced to submit and surrender his 1947 bond? If they can do this, then logically, they should be able just arbitrarily to change the interest rate on the outstanding bonds without redemption. Yet no one will contend that this can be done.

When these bonds were issued they were made payable in gold and the interest rate fixed at 3½%. Why? Because the government was in need of money. It had to borrow, and the bonds were made as attractive as possible to investors in order that the money would be forthcoming promptly. The rate of interest was a most important consideration, so important that the government agreed that if it should later issue bonds at a higher rate of interest, the bonds then issued could be exchanged for the bonds bearing the higher rate (R. 12-13). Why insert such a provision if interest were payable only at the whim of the government? And if the government had announced that it could at any time terminate its obligation to pay interest—in other words, that interest would be payable at the pleasure of the government—would the bonds have been sold? Of course not. They were purchased in the belief that the United States would pay interest until they were ready to repay the full amount of the principal in gold coin.

Can we assume that the government intended otherwise? Must we assume that, knowing the bonds would be purchased by its citizens in the belief that they were to bear interest until repaid, the government craftily contrived to use language which would foster this impression and yet leave the door open to a different construction? If so, the rule stated above (pp. 20-21) would prevent any such result.

But it is not at all necessary to make any such assumption. The reason for using the expression "until the principal hereof shall be payable" rather than "until the principal hereof shall be paid" is abundantly clear. It was known of course that the bonds would be eventually held by a vast number of persons both in this country and

abroad. The bonds were negotiable, they were not necessarily registered, and it would be impossible for the United States to know who might be at any time the holders of the bonds. It would easily be possible for a holder to have no actual notice of a redemption and he might not therefore surrender his bond for some time after the date fixed for redemption. In such cases, since the United States would be ready and willing to pay the principal on the day designated and would fail to do so simply because, the bond not being surrendered, they would have no way of knowing who to pay, it was intended that the obligation to pay interest would cease. Likewise, a bondholder might negligently fail to present his bond for payment and in such case, since the money was available for him, it was only proper that his interest should cease. It was necessary to insert such a provision in the bond because otherwise a bondholder might require the government to continue to pay him interest by merely refusing to surrender his bond, thereby defeating the right of redemption altogether. Hence it was provided that interest would cease when the principal became payable—i. e., when the United States was ready and willing to pay the principal—and the failure to pay was due simply to the failure of the holder to surrender his bond so that the United States could pay. In effect, the interest was to cease when the United States, within the time and in the mode provided in the bond, tendered payment.

This is made abundantly clear in the very similar case of *Gordillo v. Weguelin*, 5 Ch. Div. 287. In that case a mortgage bond indenture provided for semi-annual redemption of bonds by lot and provided that the numbers of the bonds drawn for redemption should be advertised in a newspaper one month before the redemption date. The indenture provided for the payment

of interest semi-annually "up to and including the day on which the said principal sum shall become payable upon presentation", and also provided, "But no interest shall be payable on any drawn bond after the day fixed for its redemption". Certain bonds were drawn for redemption but were not paid on the redemption date. The mortgaged property was placed in the hands of Trustees and the question arose as to whether or not the holders of the bonds which had been drawn for redemption but had not been redeemed and paid were entitled to be paid interest. On appeal it was contended that the interest as such ceased on the redemption date and that any interest allowed thereafter was allowable as damages only and not as interest secured by the bond and that, accordingly, the holders of the drawn bonds were not entitled to interest, or at least were not entitled to interest pro-ratably with the holders of the undrawn bonds. In speaking of this contention James, L. J., said:

> "That would be perfectly right on the assumption that if the funds are there for payment of the bond, the holder ought to tender the bond for payment, and he could not be allowed to go on getting interest against his debtor if the time had arrived when he was bound to accept repayment and the debtor had provided the requisite funds. * * *
>
> "I am of the opinion that upon the whole deed what was intended was that the interest should run until the bond was paid or until it was payable according to the terms of the deed, that is, *de facto* payable out of funds provided for that purpose. When the bonds were in truth payable, not payable in the sense of the money being recoverable in an action at law, or anything of that kind, but payable by reason of the fund being provided for the purpose of paying them, either in the hands

> of the contractors or received by the Trustees, then the interest would cease, and until it was so payable, in truth and in fact, as well as in legal right of action, then interest runs."

The other contention made by the government is that the bond obligated the United States to pay interest only until the date of redemption designated in a notice of call and that since a notice of call was issued, interest ceased on the day designated. This contention also ignores the obvious intent of the parties.

The bond provides: "All or any of the bonds of the series of which this is one may be *redeemed and paid* at the pleasure of the United States on or after June 15, 1932 * * *". After providing for the giving of notice of redemption and the method of selecting the bonds to be redeemed, it is provided:

> "From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void."

It is obvious that this provision was inserted merely in order to make clear that when the United States by issuing a notice of call for redemption signified that they were ready and willing to pay the bonds, their obligation to pay interest was to cease. Why was interest to cease on the date fixed for redemption rather than on the date of the issuance of the call or, indeed, any other date which might be selected? Obviously, because the date of redemption was the date fixed for *payment*. It is idle to argue, as the government does, that the contract did not require a *redemption*, but merely the arrival of the "*date of redemption designated*" in order for interest to cease.

The bond also provided that it could be "redeemed and paid * * * at the face value thereof and interest accrued at the date of redemption." There can certainly be no question that "date of redemption" here means the date when redemption is made, the date when payment is tendered. This provision at least means that the bondholder is entitled to his interest until payment of the principal is tendered. If there can possibly be any conflict between the two provisions, then certainly the doubt should be resolved in favor of the bondholder. But there is *no doubt*. The clear intent of the parties was that tender of payment of the principal and cessation of interest went hand in hand—they were to happen simultaneously.

The government relies upon *Morgan v. United States*, 113 U. S. 476. In that case the United States arranged to call for redemption a number of outstanding bonds which were redeemable and simultaneously issue new bonds bearing a lower interest rate. Morgan & Company bought up large quantities of the bonds which had been called for redemption, including certain bonds which had been owned by the Manhattan Savings Bank but had been stolen from it. The serial numbers on the stolen bonds had been altered and Morgan & Company, of course, had no knowledge that the bonds had been stolen. When this fact became known, the Manhattan Savings Bank claimed payment of the bonds from the Treasury Department. The Treasury Department refused payment to both Morgan & Company and the Manhattan Savings Bank and submitted the question to the Court of Claims. It was admitted that Morgan & Company had no knowledge of any circumstances which would have put them on notice that the bonds had been stolen,

but it was contended that inasmuch as the bonds had been called for redemption, they had become overdue obligations and hence had lost their negotiable character so that Morgan & Company were not entitled to the rights of a *bona fide* holder for value, but instead took only the title of their assignors. The Supreme Court in a lengthy opinion held that the fact that the bonds had been called for redemption did not make them overdue obligations and non-negotiable.

It is difficult to see just what bearing this decision has on the case here presented. It is true that in the course of its opinion, in speaking of the notice of redemption, the Court said: "The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity, and, even though not demanded, to exonerate the government from liability for interest accruing after that date;". This language is relied upon by our opponents in support of their contention, but it is obvious, when the facts of the case are considered, that the Supreme Court did not at all have in mind a situation such as that presented now. In that case the bonds provided that they were "redeemable at the pleasure of the United States." They contained no provisions as to notice or as to when interest ceased nor were they expressly made payable in gold. The "pleasure of the United States" was evidenced by the act of July 14, 1870, which authorized the Secretary of the Treasury to redeem the bonds. That Act expressly provided that notice of redemption should be given only after the Secretary of the Treasury had in hand sufficient coin to pay the bonds. The notice issued stated that the bonds would be *paid* on the day designated and before the notice was issued the Secretary of the Treasury had

made arrangements to obtain the coin with which to pay the bonds. In other words the United States stood ready and willing to pay its redeemed bonds in accordance with their terms and in such a case the legal effect of the call undoubtedly was to exonerate the government from liability for interest accruing after the maturity of the call. The very language used by the court indicates that it, of course, was not at all contemplating a situation where payment is refused. The Court simply said that if the United States in accordance with its agreement *notifies the holder of the bond* that it is ready to pay at a time when it is actually ready to pay, the holder is entitled to demand payment, and if he fails to demand payment, the government's obligation to pay interest nevertheless ceases. The Court did not undertake to say that the obligation to pay interest ceased if the government refused to pay or if it issued a notice of call for redemption without any intention of paying in accordance with the terms of the bond. Nor does the Court attempt to say what the rights of a holder of a bond called for redemption would be if the United States refused to pay, or refused to pay in gold. As a matter of fact, the Court evidently had some doubt in its mind as to whether or not a bondholder could maintain a suit against the United States in the event of non-payment after the issuance of a notice of call for redemption as now contended by our opponents. The Court said:

> "It may be admitted, *for the sake of argument—although the proposition cannot be considered indisputable*—that, after the maturity of a call for the redemption of designated bonds, the obligation of the government to pay them thereby became fixed and irrevocable, so that thereafter, on demand and re-

fusal of payment, an action would accrue to the holder for the recovery of the principal and accrued interest, the Court of Claims having jurisdiction in such cases." (113 U. S. 498.)

The passage quoted clearly indicates that the Court was not in any way passing on the question here involved. The fact is, that the United States were ready and willing to pay the bonds involved in the *Morgan* case on the redemption date. Clearly, that case does not support the proposition contended for by the government.

After all, the language of these bonds as to the payment of interest is not so ambiguous that each word or each phrase must be minutely examined in order to ascertain its meaning. The intention of the parties is entirely clear. Each bondholder was lending his government money which was to be repaid to him. In the meantime he was to receive interest for the use of his money. In order that he might be protected against loss occasioned by a depreciation in the currency, the bond was made payable in gold. The United States were to have the right to pay the bonds before maturity and thereby relieve themselves of the obligation to pay interest. Accordingly, the bonds were made redeemable at the option of the United States. The clear intent was that interest was to be paid so long as the United States had the use of the bondholders' money but was to cease as soon as the United States were ready to repay the loan. In other words, interest was to cease when payment was tendered. The government's arguments to the contrary are, we submit, entirely without merit.

We respectfully submit, therefore, that inasmuch as payment in gold coin was a condition to the exercise of the right of redemption, the failure of the United States

to pay in gold coin was a failure to redeem the respondent's bond on June 15, 1935. Consequently, the interest coupon sued on is a subsisting obligation of the United States and the respondent is entitled to judgment for the face amount thereof.

D.

The Question of Whether or Not the Respondent Would Sustain Any Damage by Reason of the Refusal of the United States to Pay the Bond in Gold Coin Is Entirely Immaterial.

The government's brief is replete with statements to the effect that the respondent in this case has sustained and can sustain no damage whatsoever by reason of the refusal of the United States to pay his bond in gold coin on the date of redemption. Over and over again the statement is made that the United States has tendered to the respondent "substantial performance" of its obligation to pay the bond in gold coin and again and again it is said that the legal tender currency which the United States tendered to the respondent in payment of his bond was the "equivalent" of the gold coin which he was entitled to receive and that, therefore, he has no reason to complain. We do not at all concede that the respondent will not sustain any damage by payment in legal tender currency instead of in gold coin, nor that payment in legal tender currency is a substantial compliance with the obligation of the United States to pay in gold coin, nor that legal tender currency is in any sense the "equivalent" of gold coin. Nor do we understand that this Court in the *Perry* case has decided that legal tender currency is or was the equivalent of gold coin. These questions we will discuss later. But, at this point we wish to emphasize that even if it can be assumed that the legal tender currency is the equivalent of gold coin,

and that the payment of legal tender currency is a substantial compliance with the obligation to pay gold coin, and that the respondent has not and will not be damaged by the payment of his bond in legal tender currency instead of gold coin, nevertheless these questions are entirely immaterial and of no consequence in this case. The respondent bargained for payment in gold coin; if the United States wish to redeem his bond they must carry out that bargain.

The government argues that even if the gold clause could be construed as promising payment in gold coin, nevertheless that promise could be satisfied by the payment of the "equivalent" in value of the gold coin. They contend that a substantial performance of that promise is sufficient. If this were a suit to recover damages for failure to pay the principal obligation of the bond, such arguments might possibly have merit. But this is not a suit to recover damages for the failure of the United States to pay the principal of the bond in gold coin and such arguments, therefore, have no merit. It is true that the law in some cases will permit an obligor to recover on a contract even though he has not performed his contract to the letter and has only rendered substantial performance. In such cases the obligee is compensated for the failure of the obligor to render strict performance by an award of damages. This rule is one of necessity, because otherwise one who had substantially performed his promise, could recover nothing from the promisee if he failed in some minute particulars to render complete performance. In such cases the promisee would be substantially benefited at the expense of the promisor.

See 3 *Williston on Contracts* (1936), p. 2365, §843.

But this situation does not exist in the present case. The rule of substantial performance applies only in cases where the performance has already been rendered and where it would be unjust to deprive the promisor of all compensation for the performance rendered by him. It does not apply in cases where there is merely a *tender* of performance as there is in the present case. In such cases the necessity which gives rise to the rule of substantial performance does not exist.

The refusal to permit the promisor to tender substantial performance only, would not operate unjustly and would not benefit the promisee at his expense. Where the contract is executory, a tender of substantial performance is insufficient.

We have already pointed out that in cases such as this nothing short of a strict performance will suffice (supra pp. 25-30). Therefore we need not inquire whether or not the respondent will be damaged by a failure to render a strict performance. We need not concern ourselves with the question as to whether or not the performance tendered is just as valuable as the performance contracted for. The respondent has an absolute right to refuse to accept a substitute for the thing he contracted for. He is not obliged to accept something "just as good".

We respectfully submit that if the United States wished to redeem the respondent's bond, they could do so only after a strict compliance with the conditions attached to that right of redemption. *The only* question to be determined is whether or not there has been a strict compliance. The question as to whether or not the respondent would be damaged by the acceptance of something less than strict performance has no relevance whatsoever.

III.

REGARDLESS OF WHETHER THE RESPONDENT'S BOND BE CONSTRUED AS A "GOLD COIN" CONTRACT OR AS A "GOLD VALUE" CONTRACT, PAYMENT OF THE PRINCIPAL, DOLLAR FOR DOLLAR, IN LEGAL TENDER CURRENCY, WOULD NOT BE A FULFILLMENT OF THE OBLIGATION.

In the *Perry* case the government argued at great length that the gold clause in United States bonds was not a "gold value" contract but was a "gold coin" contract. They now argue, just as vigorously, that the contract is not a "gold coin" contract at all but is a "gold value" contract. It seems to us clear that it is a "gold coin" contract, but whether it be considered one or the other makes no real difference in this case because in either event payment of the principal of the bond, dollar for dollar, in legal tender currency would be a breach of the obligation.

A.

Payment in Gold Coin Is Required.

The government complains that the respondent made no argument in the lower Court in support of his assertion that the contract was a "gold coin" contract and that payment of the principal in gold coin and not in legal tender currency was required. In this they are correct. No argument was necessary. The government did not assert the contrary, but likewise conceded that the contract was a "gold coin" contract. The contention is now made for the first time that the gold clause is a "gold value" as contrasted with a "gold coin" contract.

It seems to us, however, that the contract itself is so clear on this point as to need no argument. It provides that the principal and interest "shall be payable in

United States gold coin of the present standard of value". What could be clearer? The bond does not provide for payment in "gold coin or its equivalent"; it provides simply and only for payment in *gold coin.* Such contracts have always been sustained by this Court as valid contracts for the payment of a particular kind of money.

Thus, in *Bronson v. Rodes,* 7 Wall. 229, a bond provided for payment in gold and silver coin of the United States. The Court held that the contract was valid and that it was a contract for the payment of a certain amount in gold coin of a definite standard and could not be satisfied by the tender of a different kind of money. It was held that contracts to pay coin dollars can only be satisfied by the payment of coin dollars, and that a judgment on such a contract should be a judgment for coin dollars and not a judgment for an equivalent amount in currency. The same result was reached in *Butler v. Horwitz,* 7 Wall. 258; *Dewing v. Sears,* 11 Wall. 379; *Trebilcock v. Wilson,* 12 Wall. 687; *The Emily Souder,* 17 Wall. 666; *Thompson v. Butler,* 95 U. S. 694.

It is true that in *Gregory v. Morris,* 96 U. S. 619, which is cited by the government, the Court affirmed a judgment for an amount in currency equivalent to a specified amount in gold coin. In that case certain cattle had been pledged as security for the repayment of a certain sum in gold. The money was not repaid and the pledgee took possession of the cattle. The pledgor then replevied the cattle and posted bond to indemnify the pledgee against any damage which might be sustained by him as a result of the taking of the cattle. The case was tried *on the question of the right* of possession and the damage sustained by the pledgee. The Court pointed out

that although the original obligation was payable in gold coin, nevertheless the question at issue in the case was the amount of damage sustained by the pledgee by reason of the unlawful taking of the property by the pledgor. In other words, the suit was not directly on the original obligation to pay in gold coin. Even then the Court was careful to point out that the plaintiff was satisfied to take a judgment for an amount of legal tender currency equivalent to the gold coin, and indicated rather clearly that had he objected, he would probably have been entitled to a judgment for the amount due him in gold coin.

Prior to the decision of this Court in the *Perry* case there can certainly not be the slightest doubt but that this Court has uniformly and consistently held that contracts such as that involved in the present case are "gold coin" contracts as contrasted with "gold value" contracts.

But the government contends that this Court in the *Perry* case overruled the clear holding of the previous cases and decided that the contract in the *Perry* case was a "gold value" and not a "gold coin" contract. It seems to us clear that this was not the decision in the *Perry* case. In the first place, in view of the long line of authorities directly to the contrary, this Court would have been very slow to reach such a conclusion, and had it reached such a conclusion, it would have definitely stated that the prior decisions were overruled. It is to be observed, however, that although this Court referred to the earlier cases in both the *Perry* case and in *Norman v. B. & O. Railroad*, 294 U. S. 240, the earlier cases were not overruled. The Court merely pointed out that the situation at the time those cases were decided was different from

that existing now because when the earlier cases were decided, gold coin was in circulation, whereas, now no gold coin is in circulation. Now, obviously that distinction, while it might have some importance in determining the legal operation and effect of the gold clause at the present time, can have no effect in construing that clause, that is, in ascertaining the meaning of the parties, because at the time the bonds in this case were issued, gold coin was still in circulation and the situation then was exactly the same as it was at the time of the decisions in the earlier gold cases.

This Court was very careful to avoid any implication that it was overruling the decision in *Bronson v. Rodes,* and the other early gold cases. The majority opinion in the *Perry* case certainly did not state that the gold clause in the bond was a "gold value" contract and not a "gold coin" contract. Nor does the language quoted by the government in its brief lend itself to that interpretation.

But even if there should be any uncertainty as to the exact meaning of the language appearing in the opinion, certainly the decision of the Court leaves no room for doubt concerning its interpretation of the gold clauses.

The government argues that the clause should be construed as though it read "payable in gold coin or its equivalent". It is contended that the government had the option to pay either gold coin or to pay the equivalent of gold coin in legal tender currency and that this Court in the *Perry* case decided that the legal tender currency was the equivalent of gold coin. But if this were true, then certainly this Court could not have held that the Joint Resolution of June 5, 1933, was invalid as applied to obligations of the United States. If it could be

said that the United States had the option to pay either gold coin, or its equivalent in legal tender currency, and that the legal tender currency was, dollar for dollar, the equivalent of gold coin, then certainly Congress would not be exceeding its power by exercising this option and declaring in the Joint Resolution that gold coin should not be paid and that legal tender currency only should be paid. It would be doing that which it had a perfect right to do. If it had a right to pay the equivalent rather than the gold, then it could certainly elect to pay in legal tender currency. That is all the Joint Resolution purported to do. This would not be overriding the obligation of the bond, it would be performing the obligation of the bond. And yet this Court held that the Joint Resolution as applied to bonds of the United States, was invalid.

The truth is that this Court did not say that the gold clause was a "gold value" contract nor did it hold that a devalued paper dollar was the equivalent of the gold dollar required to be paid. It held only that there was no proof that Perry had sustained damage by reason of the failure of the United States to pay him gold coin.

B.

Even if It Be Assumed That the Gold Clause Is a "Gold Value" Contract, the Burden Is Upon the Government to Prove That It Has Tendered the Equivalent of the Gold Coin, and This It Has Not Done.

In many places in its brief the government assumes that the burden is upon the respondent to establish the fact that he has suffered damage and that the legal tender currency tendered to him is not the equivalent of the gold coin to which he was entitled. As we have

above pointed out this question has no relevancy but even if we assume that the obligation could be satisfied by the payment of an amount in legal tender currency equivalent to the gold coin to which the respondent was entitled, the burden of proof is upon the government to show that the amount it has tendered is the equivalent of the gold coin, and not upon the respondent to show that the amount tendered is not the equivalent of the gold coin.

As pointed out previously, the government in this case is in effect pleading a confession and avoidance; it is setting up an affirmative defense to the claim of the respondent. It is elementary that in such cases the burden is upon him who offers the affirmative defense to establish it, and not upon the plaintiff to disprove it. This is particularly true in cases where the affirmative defense is a plea of tender. It is then incumbent upon the one alleging the tender to prove not only that a tender was made, but that a tender of the exact amount due, in the medium of payment called for by the contract, was made. The same is true in cases where payment is pleaded. He who alleges payment must prove that he has paid the obligation and prove that he has paid the full amount which was due.

See:

Simonton v. Winter, 5 Pet. 141
Wallace v. McConnell, 13 Pet. 136
Robinson v. Smith, 92 So. 546 (Ala.)
North Pennsylvania R. R. Co. v. Adams, 54 Pa. 94
Davis v. Nelson's Estate, 73 Vt. 328
Tuthill v. Morris, 81 N. Y. 94
United States Wringer Co. v. Cooney, 73 N. E. 803 (Ill.)
Burton's Ex'r. v. Manson, 129 S. E. 356 (Va.)

Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 89 Atl. 909 (Conn.)
Jones on Evidence, 2nd Ed., Vol. 2, pp. 851, 866, §§479, 486
48 C. J. 680, Tit. "Payment", §176
62 C. J. 698, Tit. "Tender", §101

Now, in the present case, the government avers that it has tendered to the respondent an amount in legal tender currency equivalent to the gold coin to which he was entitled. It is, therefore, incumbent upon the government to prove that the amount tendered in legal tender currency *was* the equivalent of the gold coin contracted for. But this the government does not do. It *avers* and *argues* that the legal tender currency was the equivalent of the gold coin, but it does not *prove* that it was. On the contrary, the government argues that the burden is upon the respondent to prove that it is not the equivalent.

It is said that this Court in the *Perry* case has decided that the legal tender currency was the equivalent of the gold coin. But this is not correct. This Court expressly refrained from so deciding. It did decide that in that case there was no evidence that the legal tender *currency was not the equivalent of the gold* coin and that since the burden of proof in that case was on the plaintiff to establish that fact, he failed to recover. *But the situation* is just the reverse in the present case. Here the burden is upon the government and it has not offered any evidence to *support its allegation* that the *legal tender currency is the equivalent of the gold coin.*

The government argues that the respondent, if he had been paid gold coin, would have been obliged to surrender it immediately to the United States and ac-

cept an equal amount of legal tender currency therefor, and that consequently the two must be taken to be equivalent. But this is merely begging the question. If it be true that the gold coin could be paid and then immediately retaken and legal tender currency substituted, obviously the net result of the transaction is a payment in legal tender currency. It could not be considered a payment of gold coin at all. In addition it does not seem at all clear to us that the government is correct in assuming that having once paid the gold coin the United States could appropriate it by paying an equal amount of legal tender currency. This assumption is based upon the premise that the gold coin and the legal tender currency are equivalent. But there is no proof of this fact and if the two should not be equivalent then the whole argument falls. It is also true that under the regulations issued pursuant to the Gold Reserve Act of 1934, the Secretary of the Treasury has been buying gold and paying $35.00 per ounce for it. *In June, 1935, this included not* only newly mined gold but also gold bullion and gold coins imported from abroad. In other words it included all gold lawfully in the possession of the holder, that is, all gold which had not been withdrawn from circulation before the devaluation of gold. Why would it not also include gold coins which had been lawfully delivered to the respondent in payment of his bond? If so, it would appear that the equivalent of the gold coin to which the respondent was entitled was much more than the legal tender currency tendered to him.

We submit, therefore, that it can not be assumed that legal tender currency is, dollar for dollar, the equivalent of gold coin and that the burden of proving that fact rests on the government.

IV.

THE JOINT RESOLUTION OF JUNE 5, 1933, WAS UNCONSTITUTIONAL INSOFAR AS IT ATTEMPTED TO OVERRIDE THE OBLIGATION CREATED BY LIBERTY LOAN BONDS.

In its decision in the *Perry* case, this Court very definitely held that the Joint Resolution of June 5, 1933, was invalid in so far as it attempted to abrogate the gold clause in obligations of the United States. In the opinion of Mr. Chief Justice Hughes, concurred in by the majority of the Court, it was said:

> "We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power." (294 U. S. 354).

In spite of this very clear and positive declaration concerning the invalidity of the Joint Resolution of June 5, 1933, the government contends (brief pp. 87-102) that the Joint Resolution is not invalid as applied to Liberty Bonds. Three reasons are advanced for this contention. First, that the passage quoted above stated the views of only four members of the Court and, therefore, does not have the force of precedent. Second, that the conclusion quoted was not necessary to the decision in the *Perry* case and, therefore, does not have the force of precedent. And, third, that this Court construed the gold clause to be a "gold value" contract and that consequently the Joint Resolution could not have been invalid because in that view of the case it did not infringe on the obligation expressed in the bond.

It seems to us that in making these contentions the government is attempting to re-argue questions which were finally and definitely settled by the decision in the

Perry case. We do not propose in this case to re-argue those questions. We do wish, however, to point out the complete fallacy of the observations made by the government concerning the decision in the *Perry* case.

In the first place, the statement that the decision was concurred in by only four Justices is incorrect. At least eight of the Justices concurred in holding the Joint Resolution of June 5, 1933, invalid as applied to obligations of the United States. Not only did the Chief Justice and the three Associate Justices who concurred in his opinion hold that the Joint Resolution was invalid, but also Mr. Justice McReynolds and the three Associate Justices who concurred with him very definitely stated their opinion that the Joint Resolution was invalid. The only difference between the two opinions on this point was that in the opinion of the Chief Justice and the Associate Justices who concurred with him, the Joint Resolution was valid as applied to private obligations and invalid as applied to obligations of the United States, whereas, in the opinion of Mr. Justice McReynolds and the three Associte Justices who concurred with him, the Joint Resolution was invalid as applied to both private obligations and obligations of the United States. It is true that Mr. Justice Stone did not go quite that far, but he also said that the Joint Resolution constituted a repudiation of the obligation contained in the bonds. He felt that the government, through the exercise of its power to regulate the currency, had rendered itself immune from *liability* for its repudiation. He expressly refrained from indicating whether or not the obligation of the United States on its gold clause bonds was any greater or any different than the obligation of private persons or corporations on their gold clause bonds. It is, therefore, absurd for the gov-

ernment to contend that the decision of this Court holding the Joint Resolution of June 5, 1933, invalid in so far as it attempted to override the obligations of the United States, has no force as precedent.

The government also urges that the decision in the *Perry* case does not have the binding force of precedent because it was not necessary to the conclusion finally reached. We must confess that we do not follow the reasoning of the government on this point. It seems to us clear that the decision on the question of the validity of the Joint Resolution as applied to obligations of the United States was very essential to the determination of the question presented to the Court in that case. If the Court had been of the opinion that the Joint Resolution as applied to United States obligations had the same effect as when applied to private obligations, it would have been entirely unnecessary for the Court to discuss the question as to whether or not Perry had sustained damage. *The decision in the Perry* case would, in such event, have been the same as that in the *Norman* case. If the Joint Resolution had been valid as applied to government obligations, then no question could have arisen as to whether or not the government had breached its obligation. The gold clause would have been wiped out just as completely as it was in the *Norman* case. It seems to us, therefore, that the decision in the *Perry* case to the effect that the Joint Resolution was invalid as applied to obligations of the United States, was not only necessary to the conclusion reached but it was of the very essence of the decision in that case. There cannot be the slightest question about this.

And finally the government contends that this Court in the *Norman* and *Perry* cases held the gold clauses to be

"gold value" contracts and that, since in that view of the undertaking the Joint Resolution could not have been an infringement of the obligation of the bonds, it cannot be assumed that this Court held that it was such an infringement. But such tenuous reasoning as this gets us nowhere. All the government is attempting to do is to reargue the question definitely decided by this Court. The same authorities are cited and the same arguments are advanced as were cited and advanced to this Court in the course of the argument of the *Perry* case. The point is that this Court felt that such arguments had no merit and it did hold the Joint Resolution invalid as applied to obligations of the United States. Nothing can be gained by re-arguing that question. And it is foolish to contend that because that decision does not meet with the approval of the government, it, therefore, must not be understood to mean what it says. We have already shown (supra, pp. 61-65) that the gold clause was a "gold coin" contract and not a "gold value" contract. But in determining whether or not the Joint Resolution as applied to government obligations is invalid, it makes no difference whether the clause be considered as a "gold coin" clause or a "gold value" clause. If it was a "gold coin" clause, as the government in its argument in the *Perry* case contended, then the Joint Resolution was invalid because it undertook to repudiate the obligation to pay gold coin. If it was a "gold value" clause, as the government now contends, then the Joint Resolution was invalid because it undertook to substitute for the "gold value," legal tender currency in an amount which was arbitrarily fixed without regard to whether or not it represented the "gold value" contracted for, and hence constituted a repudiation of the obligation to pay "gold value".

The Joint Resolution of June 5, 1933, represented a deliberate attempt to repudiate the obligation of the United States as expressed in the gold bonds which had been issued. There was no attempt to disguise the repudiation and call it something else. In its argument in the *Perry* case the government did not contend that there was no repudiation; on the contrary, it attempted to justify that repudiation on the ground that it was an act taken in exercise of the sovereign power to control and manage the currency. This contention was definitely rejected by this Court. Only one member of the Court concurred in the view of the government that through the exercise of its power to regulate the value of money it could render itself immune from liability for the repudiation of its undertaking. The other eight Justices concurred in the view that Congress could not, in the exercise of its power to regulate the currency, repudiate the solemn obligations of the United States. And it should be noted that in so holding the Court did not question the power of Congress to regulate the currency. As stated by Mr. Chief Justice Hughes:

> "There is no question as to the power of the Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which the government has theretofore issued in the exercise of the power to borrow money on the credit of the United States." (294 U. S. 350.)

And as stated by Mr. Justice McReynolds:

> "There is no challenge here of the power of Congress to adopt such proper 'monetary policy' as it may deem necessary in order to provide for national

obligations and furnish an adequate medium of exchange for public use." (294 U. S. 369.)

"Congress may coin money; also it may borrow money. Neither power may be exercised so as to destroy the other; the two clauses must be so construed as to give effect to each. Valid contracts to repay money borrowed cannot be destroyed by exercising power under the coinage provision." (294 U. S. 377.)

Likewise, as we have stated several times before, we are not in this case challenging the power of Congress to regulate the currency. The government devotes a large portion of its brief to an exposition and discussion of that power. We admit that Congress has the power to regulate the currency. We admit that in the exercise of that power Congress may withdraw gold from circulation. We admit that Congress may refuse to pay the respondent's bond in gold coin. All discussion of those questions is simply beside the point. Conceding the power of Congress to forbid the payment of gold, the question is, having thus made it impossible to perform their obligation to pay the gold coin, can the United States exercise their option to redeem their gold bonds? That is the only question presented in this case. It is an issue which the government attempts to avoid by discussing many other irrelevant questions.

CONCLUSION.

We have not undertaken in this brief to press the points made by the respective petitioners in *Smyth v. United States,* No. 42, Oct. Term, 1937, and *Dixie Terminal Corporation v. United States,* No. 43 Oct. Term, 1937, to the effect that the bonds in question could not be called for redemption except by an Act of Congress ex-

ercising the right of redemption, and that in view of U.S.C., Tit. 31, §731, the bonds in question could not be redeemed at all in June, 1935. While we believe there is substantial merit in each of these contentions, nevertheless, a decision based on either contention would leave open the far more important question presented by this case. A decision on that question by this Court is essential because, although the amount directly involved in this suit is very small, the principles involved are of great importance.

We ask only that the government be required to adhere strictly to the terms of its obligation and not be permitted to repudiate its promise. The promise to pay interest until maturity or prior redemption is clear. And no plentitude of words can alter the fact that without payment in gold coin there could be no redemption.

We do not deny that the respondent's bond was subject to redemption but we do most earnestly contend that the right of redemption depended upon the giving of a *bona fide* notice of redemption and actual redemption by payment in gold coin. Neither condition has been complied with and the coupon sued on is still a valid subsisting obligation of the United States which should be paid.

We respectfully submit, therefore, that the judgment of the Circuit Court of Appeals should be affirmed so that a judgment for the respondent in the amount of $17.50 may be entered.

Respectfully submitted,

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Attorneys for Respondent.

Cardozo J. p. 5, 10.
Stone J. p. 2,

SUPREME COURT OF THE UNITED STATES.

Nos. 42, 43 and 198.—October Term, 1937.

James D. Smyth, Executor of the Estate of James J. Ransom, deceased, Petitioner, 42 *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
The Dixie Terminal Company, Petitioner, 43 *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
The United States of America, Petitioner, 198 *vs.* Arthur W. Machen.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 13, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

Three cases present a single question: Was a notice of call issued by the Secretary of the Treasury for the redemption of Liberty Loan bonds effective to terminate the running of interest on the bonds from the designated redemption date?

Petitioner in No. 42 is the owner of a $10,000 First Liberty Loan 3½% bond of 1932-1947, serial number 6670. The bond was issued pursuant to the Act of April 24, 1917 (40 Stat. 35), and Treasury Department Circular No. 78, dated May 14, 1917, and was purchased by petitioner in December, 1934, for $10,362.50 and accrued interest. Its provisions, so far as material, read as follows:

"The United States of America for value received promises to pay to the bearer the sum of Ten Thousand Dollars on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States gold coin of the present

standard of value, . . . All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. . . . From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. . . ."

On March 14, 1935, the Secretary of the Treasury published a notice of call for the redemption on June 15, 1935, of all the bonds so issued. "Public notice is hereby given:

1. All outstanding First Liberty Loan bonds of 1932-47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932-47 (First 3½'s), dated June 15, 1917; . . .

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935."

Thereafter, on April 22, 1935, the Secretary of the Treasury issued a circular (Department Circular, No. 535) prescribing rules for the redemption of First Liberty Loan bonds, and providing, among other things, as follows: "Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on June 15, 1935, with interest in full to that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds."

Nearly two years before the publication of the notice of call Congress had adopted the Joint Resolution of June 5, 1933 (48 Stat. 112) by which every obligation purporting to be payable in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby was to be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public and private debts. Nearly four weeks before the publication of the notice of call, the validity of that Joint Resolution had been the subject of adjudication by this court in the Gold Clause Cases, *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240, *Nortz* v. *United*

States, 294 U. S. 317, and *Perry* v. *United States,* 294 U. S. 330, all decided February 18, 1935. We may presume that the call was issued with knowledge of those rulings.

About six months after the date designated for redemption, petitioner, on December 28, 1935, presented his bond (with coupons due on and before June 15, 1935, detached) to the Treasurer of the United States, and demanded the redemption by the payment of 10,000 gold dollars each containing 25.8 grains of gold nine-tenths fine, which was the gold content of a dollar in 1917. The Treasurer refused to comply with that demand, but offered payment of the face amount of the principal in legal tender coin or currency other than gold or gold certificates. Petitioner declined to accept the tender and retained the bond. Thereafter, on the same day, petitioner presented to the Treasurer of the United States, the interest coupon for the six-months period June 15 to December 15, 1935, and demanded payment either in gold coin or legal tender currency. The Treasurer refused payment on the ground that the bond to which the coupon was attached had been called for redemption on June 15, 1935.

An action followed in the Court of Claims, petitioner resting his claim upon the interest coupon only, and limiting his demand to a recovery in current dollars.[1] The Court gave judgment for the United States on the ground that on the designated redemption date, all coupons for later interest became void. Because of the important interests, public and private, affected by the judgment, a writ of certiorari was granted by this court.

Petitioner in No. 43 is the owner of a $50 Fourth Liberty Loan 4½% bond of 1933-1938, which it bought on March 9, 1935. The bond was issued pursuant to the Act of September 24, 1917 (40 Stat. 288) as amended, and Treasury Department Circular, No. 121. It was to mature on October 15, 1938, subject, however, to redemption on October 15, 1933 or later. The terms of redemption are stated in Circular No. 121, which is incorporated by reference

[1] The Joint Resolution of Aug. 27, 1935 (49 Stat. 938, 939), withdrawing the consent of the United States to suit where the claimant asserted against it a right, privilege or power "upon any gold clause securities of the United States or for interest thereon" makes an exception of any suit begun by January 1, 1936, as well as any proceeding "in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins or currencies of the United States involved in such proceeding." Petitioner has brought himself within each branch of the exception.

into the bond itself. Six months notice by the Secretary of the Treasury was required. "From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease." On October 12, 1933, the Secretary of the Treasury published a notice of call for redemption on April 15, 1934, of certain bonds of this issue. The bond now owned by petitioner is one of them. There were tenders and refusals similar to those described already in the statement of the other cases. An action followed in the Court of Claims. Petitioner prayed for judgment in the sum of $1.07, the amount of the interest coupon for the six months period ending October 15, 1934.[2] The court dismissed the claim, and the case is here on certiorari.

Respondent in No. 198 is the owner of a $1,000 First Liberty Loan 3½% bond of 1932-1947, No. 47084, purchased on March 22, 1933, for $1,011.25. This is the same bond issue involved and described in No. 42. Respondent did not present his bond for payment either on the redemption date or later. He did not present the coupon which is the foundation of the suit. However, the fact is stipulated that the Treasurer of the United States and other fiscal agents have not at any time been directed by the Secretary of the Treasury to redeem the bonds in gold coin, but have been authorized and directed to redeem in legal tender currency. The fact is also stipulated that there was a refusal to pay similar coupons for interest accruing after the date of redemption. Respondent brought suit upon his coupon in the United States District Court for the District of Maryland. The District Court gave judgment in favor of the United States. The Court of Appeals for the Fourth Circuit reversed and ordered a new trial (87 F. (2d) 594), declining to follow the ruling which had been made by the Court of Claims. The case is here on certiorari on the petition of the Government.

Hereafter, for convenience of reference, the bondholder in each of the three cases will be spoken of as a "petitioner", without adverting to the fact that in one of them (No. 198) he is actually a respondent.

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[2] The coupon reads as follows: "The United States of America will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50 Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938 unless called for previous redemption".

First: The so-called redemption provisions of the bonds are provisions for the acceleration of maturity at the pleasure of the Government, and upon publication of the notice of call for the period stated in the bonds the new date became substituted for the old one as if there from the beginning.

The contract is explicit. "From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void." The contract is not to the effect that interest shall cease upon or after payment. Cf. *Sterling* v. *H. F. Watson Co.*, 241 Pa. 135, 140. The contract is that interest shall cease upon the date "designated" for payment. The rule is established that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government even though there has been default in the payment of the principal. *Angarica* v. *Bayard*, 127 U. S. 251; *United States* v. *North Carolina*, 136 U. S. 211; *United States* v. *North American Co.*, 253 U. S. 330, 336; *Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, 304. The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *United States* v. *Rogers*, 255 U. S. 163, 169. If the bonds in suit had matured at the date of natural expiration, interest would automatically have ended, whether the bonds were paid or not. Maturity at a different and accelerated date does not make the obligation greater. In the one case as in the other the interest obligation ends, and this for the simple reason that the contract says that it shall end. Upon non-payment of principal at the ~~accelerated~~ maturity, the bondholder, if unpaid, has a remedy by suit to recover principal, with interest then overdue, but not interest thereafter. Upon non-payment of principal at the accelerated date, he has a like remedy, but no other. Default, if there has been any, is as ineffective in one situation as in the other to keep interest alive.

Petitioners insist, however, that the notices of call were not adequate to accelerate maturity, with the result that interest continued as if notice had not been given. This surely is not so if we look to form alone and put extrinsic facts aside. "All outstanding First Liberty Loan bonds of 1932-47 are hereby called for redemption on June 15, 1935". "All outstanding Fourth Liberty Loan 4¼

per cent bonds of 1933-38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows", (the serial numbers being thereupon stated). Nothing could be simpler, nothing more clearly adequate, unless the notices are to be supplemented by resort to extrinsic facts, the subject of judicial notice, which neutralize their terms. Petitioners maintain that such extrinsic facts exist. In their view, each of the two forms of notice must be read as if it incorporated within itself the Joint Resolution of June 5, 1933, and promised payment in the manner called for by that Resolution, and not in any other way. Thus supplemented, we are told, the notice is a nullity, for the payment that it promises is not the payment owing under the letter of the bond.

The notice of call for the redemption of the bonds was a notice, not a promise. The Secretary of the Treasury was not under a duty to make any promise as to the medium of payment. He did not undertake to make any. The obligation devolving upon the United States at the designated date was measured by the law, and the law includes the Constitution as well as statutes and resolutions. The medium of payment lawful at the time of issuing the call might be different from that prevailing at the accelerated maturity. This might happen as a consequence of an amendment of the statute. It might happen through judicial decisions adjudging a statute valid and equally through judicial decisions adjudging a statute void. The interval between notice and redemption was three months in the case of the First Liberty bonds; it was six months for the Fourth. The Secretary of the Treasury understood these possibilities when he sent out his notices for the redemption of the bonds in suit. Indeed, *Perry* v. *United States, supra,* had already been decided when bonds of the First Liberty issue were made the subject of his call. In each form of notice the implications of the call are clear. What the bondholders were told was neither more nor less than this, that at the accelerated maturity they would be entitled to payment in such form and in such measure as would discharge the obligation. The Secretary's beliefs or expectations as to what the proper form or measure would be at the appointed time are of no controlling importance, even if they were shown. The obligation was not his; it was that of the United States. His own beliefs and expectations and even those of the Government might be changed

or frustrated by subsequent events. The bondholders had the assurance that the bonds would be redeemed, and they were entitled to no other. Whatever medium of payment would discharge the obligation if maturity had been attained through the natural lapse of time would discharge it as completely at an accelerated maturity. The same money that would "pay" would serve also to "redeem". There is no reason to believe that the one situation was distinguished from the other in the minds of the contracting parties. The sum total of existing law—Constitution and statutes and even controlling decisions, if there were any—would say how much was due.

If this analysis is sound, it carries with it the conclusion that the call did not commit the Government either expressly or by indirection to a forbidden medium of payment. The case for the petitioners, if valid, must rest upon some other basis. A suggested basis is that the existence of the Joint Resolution amounted without more to an anticipatory breach, which made the notice of redemption void from its inception, if there was an election so to treat it, and this though the notice left the medium of payment open. But the rule of law is settled that the doctrine of anticipatory breach has in general no application to unilateral contracts, and particularly to such contracts for the payment of money only. *Roehm* v. *Horst*, 178 U. S. 1, 17; *Nichols* v. *Scranton Steel Co.*, 137 N. Y. 471, 487; *Kelly* v. *Security Mutual Life Ins. Co.*, 186 N. Y. 16; Williston, Contracts, rev. ed., vol. 5, sec. 1328; Restatement, Contracts, secs. 316, 318. Whatever exceptions have been recognized do not touch the case at hand. *New York Life Insurance Co.* v. *Viglas*, 297 U. S. 672, 679, 680. Moreover, an anticipatory breach, if it were made out, could have no effect upon the right of the complaining bondholders to postpone the time of payment to the date of natural maturity. The sole effect, if any, would be to clothe them with a privilege to declare payment overdue, which is precisely the result that they are seeking to avoid. The conclusion therefore follows that for the purpose of the present controversy the breach would be immaterial even if it were not unreal. But its unreality is the feature we prefer to dwell upon. The Government was not subject to a duty to keep the content of the dollar constant during the period intervening between promise and performance. The erroneous assumption of the existence of such a duty vitiates any argument in favor of the petitioners as to an anticipatory breach

just as it vitiates their argument as to the implications of the call. The duty of the Government and its only one was to pay the bonds when due. If the statutes had been amended before the date of redemption or if the courts had decided that payment must be made in gold or in currency proportioned to the earlier content of the dollar, there is little likelihood that any one would judge the efficacy of the notice by the test of the law in force at the date of its announcement.

The petitioners being dislodged from the position that the notices of call were void in their inception are perforce driven to the stand that they became nullities thereafter, when the statutes were unrepealed at the designated date. But at the designated date the accelerated maturity was already an accomplished fact. The duty of payment did not arise in advance of maturity. In the very nature of things it presupposes maturity as a preliminary condition. If there had been any different intention, the bonds would have provided that interest should cease upon payment or lawful tender, and not from the date of redemption stated in the call. This is not a case of mutual promises or covenants with performance to be rendered on each side at a given time and place. The obligees were not under a duty to do anything at all at the accelerated maturity, though they were privileged, if they pleased, to present the bonds for payment. Most of the learning as to dependent and independent promises in the law of bilateral contracts (*Loud* v. *Pomona Land and Water Co.*, 153 U. S. 564, 576) is thus beside the mark. This is a case of a unilateral contract where the only act of performance, the payment of the bonds, was one owing from the obligor, and arose by hypothesis upon maturity and not before. Let maturity, whether normal or accelerated, be accepted as a postulate, and it must follow that default in payment will not change the date again. If the Government were to come forward with a tender a day or a week after the designated date, the obligees would not be sustained in a rejection of the payment on the theory that the original date of maturity had been restored by the delay. If the obligees were to sue after the designated date, the Government would not be heard to say that because of the default in payment, the proposed acceleration was imperfect and inchoate. As pointed out already, the bondholders became entitled, when once the notice had been published, to a measure and medium of payment sufficient

to discharge the debts. If the then existing Acts of Congress were valid altogether, payment would be sufficient if made in the then prevailing currency. If the Acts were invalid, either wholly or in some degree, there might be need of something more, how much being dependent upon the operation of an implied obligation, read into the bonds by a process of construction, to render an equivalent. Whatever the form and measure, the bondholders had a remedy if they had chosen to invoke it.

We do not now determine the effect of a notice given in bad faith with a preconceived intention to withhold performance later. Fraud vitiates nearly every form of conduct affected by its taint, but fraud has not been proved and indeed has not been charged. There is no reason to doubt that a Secretary of the Treasury who was willing to give notice of redemption after knowledge of the decision in *Perry* v. *United States* understood that the obligation of the Government would be measured by the Constitution and not by any statute, in so far as the two might be found to be in conflict. Never for a moment was there less than complete submission to the supremacy of law. At the utmost, there was honest mistake as to rights and liabilities in a situation without precedent. Fraud being eliminated, the case acquires a new clarity. When we reach the heart of the matter, putting confusing verbiage aside and fixing our gaze upon essentials, the obligation of the bonds can be expressed in a simplifying paraphrase. "This bond shall be payable on June 15, 1947, or (upon three months notice by the Secretary of the Treasury) on June 15, 1932, or any interest date thereafter." That is what was meant. That in substance is what was said.[8]

No question of constitutional law is involved in the decision of these cases. No question is here as to the correctness of the decision in *Perry* v. *United States*, or as to the meaning or effect of the opinion there announced. All such inquiries are put aside as unnecessary to the solution of the problem now before us. Irrespective of the validity or invalidity of the whole or any part of

[8] Important differences exist, and are not to be ignored, between the retirement of shares of stock (Sterling *v.* H. F. Watson Co., *supra*; Corbett *v.* McClintic Marshall Corp., 17 Del. Ch. 165), and the accelerated payment of money obligations, and also between the acceleration of the obligations of the Government and those of other obligors. In the case of private obligations, a liability for interest survives the acceleration of the debt and continues until payment. In the case of Government obligations, interest does not continue after maturity (in the absence of statute or agreement) though payment is not made.

the legislation of recent years devaluing the dollar, the maturity of the bonds in suit was accelerated by valid notice. As a consequence of such acceleration the right to interest has gone.

Second: The Secretary of the Treasury did not act in excess of his lawful powers by issuing the calls without further authority from the Congress than was conferred by the statutes under which the bonds were issued.

The argument to the contrary is inconsistent with the plain provisions of the statutes and also of the bonds themselves.

There was also confirmation of his power in subsequent enactments. Victory Liberty Loan Act, sec. 6, 40 Stat. 1311, as amended, March 2, 1923, 42 Stat. 1427, and January 30, 1934, sec. 14 (b), 48 Stat. 344; Gold Reserve Act of 1934, sec. 14, 48 Stat. 342; Act of February 4, 1935, secs. 2, 4, 49 Stat. 20. 343

Third: In issuing the calls, the Secretary of the Treasury was not limited by the Act of March 18, 1869 (R. S. 3693; 16 Stat. 1) which in its day placed restrictions upon the redemption by the Government of interest-bearing bonds.

The aim of that statute was the protection of holders of United States obligations not bearing interest, the "greenbacks" of that era. "The bonds of the United States are not to be paid before maturity, while the noteholders are to be kept without their redemption, unless the noteholders are able at the same time to convert their notes into coin." Statement of Robert C. Schenck, one of the House Managers, Congressional Globe, March 3, 1869, p. 1879. Upon the resumption of specie payments in 1879 the aim of the statute was achieved, and its restrictions are no longer binding.

The judgments in Nos. 42 and 43 should be affirmed, and that in No. 198 reversed.

Ordered accordingly.

Dissenting: Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 42, 43 and 198.—October Term, 1937.

James D. Smyth, Executor of the Estate of James J. Ransom, deceased, Petitioner, *vs.* The United States.	On *Writ of* Certiorari to the Court of Claims.
42	
The Dixie Terminal Company, Petitioner, *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
43	
The United States of America, Petitioner, *vs.* Arthur W. Machen.	On Writ of Certiorari to to the United States Circuit Court of Appeals for the Fourth Circuit.
198	

[December 13, 1937.]

Mr. Justice Stone.

I concur in the result.

I think the court below, in the *Machen* case, 87 Fed. (2d) 594, correctly interpreted the bonds involved in these cases as reserving to the government the privilege of accelerating their maturity by paying them or standing ready to pay them on any interest date according to their tenor, and upon giving the specified notice fixing the "date of redemption." The words "redeemed" and "redemption" as used in the bonds[1] point the way in which the privilege was to be exercised as plainly as when they are written in the bonds

[1] The redemption clause is as follows:

"The principal and interest of this bond shall be payable in United States gold coin of the present standard of value, . . . All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or ates, at the face value thereof and interest accrued at the date of redemption, o notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. . . . From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. . . ."

of a private lender. *Lynch* v. *United States,* 292 U. S. 571, 579; cf. *Perry* v. *United States,* 294 U. S. 330, 352. If payment, or readiness to pay the bonds in accordance with their terms was essential to "redemption," the one or the other, equally with the required notice, was a condition of acceleration.

The obligation of the bonds, read in the light of long established custom and of our own decision in *Holyoke Water Power Co.* v. *American Writing Paper Co.,* 300 U. S. 324, ~~326~~ 336, decided since the *Perry* case, must, I think, be taken to be a "gold value" undertaking to pay in gold dollars of the specified weight and fineness or their equivalent in lawful currency. Compare *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 302. *Feist* v. *Societe Intercommunale Belge D'Electricite,* L. R. [1934] C. C. 172, 173. The suppression of the use of gold as money, and the restriction on its export, and of its use in international exchange by acts of Congress, 48 Stat. 1, 337, did not relieve the government of its obligation to pay the stipulated gold value of the bonds in lawful currency. Hence it has not complied, or ever stood ready to comply, with one of the two conditions upon performance of which the bonds "may be redeemed and paid" in advance of their due date—the payment to the bondholder of the currency equivalent of the stipulated gold value.

It will not do to say that performance of this condition can be avoided or dispensed with by the adoption of any form of words in the notice. Nor can it be said that a declaration, in the notice, of intention to pay whatever can be collected in court, see the *Perry* case, *supra* 354, is equivalent to a notice of readiness to pay the currency equivalent of the gold value stipulated to be paid, or that a statement of purpose to pay what will constitutionally satisfy the debt suffices to accelerate although no payment of the currency equivalent is made or contemplated or is permitted by the statutes. It follows that judgment must go for the bondholders unless the Joint Resolution of Congress of June 5, 1933, 48 Stat. 112, requiring the discharge of all gold obligations "dollar for dollar" in lawful currency, and declaring void as against public policy all provisions of such obligations calling for gold payments, is to be pronounced constitutional.

Decision of the constitutional question being in my opinion now unavoidable, I am moved to state shortly my reasons for the view that government bonds do not stand on any different footing from

those of private individuals and that the Joint Resolution in the one case, as in the other, was a constitutional exercise of the power to regulate the value of money. Compare *Norman* v. *B. & O. R. Co., supra,* 304, 309. Without elaborating the point, it is enough for present purposes to say that the undertaking of the United States to pay its obligations in gold, if binding, operates to thwart the exercise of the constitutional power in the same manner and to the same degree *pro tanto* as do bonds issued by private individuals, *Norman* v *B. & O. R. Co., supra,* 311 *et seq.*, except insofar as the government resorts to its sovereign immunity from suit. Had the undertaking been given any force in the *Gold Clause Cases,* or the meaning which we have since attributed to it when used in private contracts, it would, if valid and but for the immunity from suit, have defeated the government policy of suspension of gold payments and devaluation of the dollar. Compare the *Norman* case, *supra,* with the concurring memorandum in *Perry* v. *United States, supra,* 360-361.

The very fact of the existence of such immunity, which admits of the creation of only such government obligations as are enforceable at the will of the sovereign, is persuasive that the power to borrow money "on the credit" of the United States cannot be taken to be a limitation of the power to regulate the value of money. Looking to the purposes for which that power is conferred upon the national government, its exercise, if justified at all, is as essential in the case of bonds of the national government as it is in the case of bonds of states, municipalities and private individuals. See *Norman* v. *B. & O. R. Co., supra,* 313 *et seq.* Its effect on the bondholders is the same in every case. Compare *Norman* v. *B. & O. R. Co., supra,* with *Nortz* v. *United States,* 294 U. S. 317. No reason of public policy or principle of construction of the instrument itself has ever been suggested, so far as I am aware, which would explain why the power to regulate the currency, which is not restricted by the Fifth Amendment in the case of any obligation, is controlled, in the case of government bonds, by the borrowing clause which imposes no obligation which the government is not free to discard at any time through its immunity from suit. I cannot say that the borrowing clause which is without force to compel the sovereign to pay nevertheless renders the government powerless to exercise the specifically granted authority to regulate the value of money with which payment is to be made.

SUPREME COURT OF THE UNITED STATES.

Nos. 42, 43 and 198.—October Term, 1937.

James D. Smyth, Executor of the Estate of James J. Ransom, deceased, *Petitioner*, 42 *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
The Dixie Terminal Company, Petitioner, 43 *vs.* The United States.	On Writ of Certiorari to the Court of Claims.
The United States of America, Petitioner, 198 *vs.* Arthur W. Machen.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 13, 1937.]

Mr. Justice Black, concurring.

Agreeing altogether with the opinion of Mr. Justice Cardozo, which deals only with the construction of the contract and the rights flowing from the notice, I find it unnecessary and therefore inappropriate to express any opinion as to the validity of the Joint Resolution of 1933 or other acts of legislation devaluing the dollar.

SUPREME COURT OF THE UNITED STATES.

No. 198.—October Term, 1937.

The United States of America, Petitioner, v. Arthur W. Machen.	Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 13, 1937.]

Mr. Justice McReynolds, dissenting.

Mr. Justice Sutherland, Mr. Justice Butler and I cannot acquiesce in the conclusion approved by the majority of the Court. In our view it gives effect to an act of bad faith and upholds patent repudiation. Its wrongfulness is betokened by the circumlocution presented in defense.

The suit is to recover in currency of today the face value of a past due coupon originally attached to a three and one-half per cent bond of the United States issued in 1917 and payable 1947—nothing else.

The opinion of the Circuit Court of Appeals, to which little can be added, sets out the important facts and adequately supports its judgment.

In 1917, when gold coins contained 25.8 grains to the dollar, the United States obtained needed funds by selling coupon bonds—among them the one here involved. They solemnly agreed to pay the holder one thousand dollars on June 15, 1947, with semi-annual interest, in "gold coin of the present standard of value" subject to the following option:—"All or any of the bonds of the series of which this is one may be redeemed[1] and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date. . . . From the date

[1] Redeem—5. To buy off, take up or remove the obligation of, by payment or rendering of some consideration; as to redeem bank notes with coin. *Webster's New International Dictionary.*

of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing *after such date* shall be void."

The promise is to pay one thousand dollars in gold coin, 1917 standard. The face value of the bond is one thousand gold dollars. The option reserved is *to redeem and pay after notice* by giving the holder that number of such dollars. The notice required is nothing less than a declaration of *bona fide* purpose to redeem or pay off the obligation as written—no other right was reserved. A notice divorced from that purpose could amount to nothing more than a dishonest effort to defeat the contract and defraud the creditor. It would not come within the fair intendment of the contract; would not, in truth, designate a "date of redemption"; and, therefore, could not hasten the maturity of the principal or cause interest to cease. All this seems obvious, if respect is to be accorded to the ordinary rules of construction and principles of law governing contracts.

The obligation of the bond was declared by this Court in *Perry v. United States,* 294 U. S. 330, 351, 353, 354, to be a pledge of the credit of the United States and an assurance of payment as stipulated which Congress had no power to withdraw or ignore. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." "The power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers" was there denied. "The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remain binding upon the conscience of the sovereign."

The right to redeem and pay the bond at face value after notice was reserved—nothing else. *Did the United States give notice of*

a *bona fide* purpose so to redeem and pay? If not they cannot properly claim to have exercised their option to mature the obligation. That they did not honestly comply with this necessary preliminary becomes obvious upon consideration of the circumstances and pertinent legislation.

There is no question here concerning the Government committing itself through notice sent out by the Secretary of the Treasury expressly or indirectly to a forbidden medium of payment. No question of an anticipatory breach of contract. The Government simply has not in good faith complied with a condition precedent. It has never given notice of purpose to pay the obligation according to its terms. Its suggestion was to make payment of another kind.

The Circuit Court of Appeals well said—

"The notice calling the bond for payment was in the usual form; and there is no question but that it would have had the effect of stopping the running of interest and avoiding the coupons maturing after June 15, 1935, except for the legislation of Congress effecting the currency, which limited the power of the Secretary of the Treasury and must be read into the notice. At the time of the issuance of the bond the gold dollar was the standard of value in our monetary system and was defined by law as consisting of twenty-five and eight tenths grains of gold nine-tenths fine. Act of Mar. 14, 1900, c. 41, sec. 1, 31 Stat. 45, 31 U. S. C. A. 314. And the statutes provided for the use of gold coin as a medium of exchange. R. S. 3511. By Presidential Proclamation of January 31, 1934, issued under the act of May 12, 1933 (38 Stat. 52, 53), as amended by the act of January 30, 1934 (48 Stat. 342), the content of the dollar was reduced to 15-5/21 grains of gold nine-tenths fine; and, at the time of the publication of the notice calling the bond for payment, gold coin had been withdrawn from circulation, its possession had been prohibited under penalty, and payment in gold coin by the United States had been prohibited. 48 Stat. 337, 340. By joint resolution of June 5, 1933 (48 Stat. 112, 113), the payment of gold clause bonds in any legal tender currency 'dollar for dollar' had been authorized; and it was paper currency based on the 15-5/21 grain dollar, and nothing else, that was offered in payment of gold clause bonds which were called for payment by the Treasury. The notice of redemption calling the bond in question for payment was equivalent, therefore, to a notice that the United States elected to redeem the bond in paper currency based on a 15-5/21 grain dollar, notwithstanding that it was payable in gold coin based on a 25-8/10 grain dollar and might be redeemed only at its face value."

. . .

"It is manifest that when the bonds were payable in gold coin of the standard of value at the time of issue, i. e., 25.8/10 grains of

gold to the dollar, a proposal to redeem them in paper money based upon 15-5/21 grains of gold to the dollar was not a proposal to redeem them at face value; and a notice that the government would redeem them on such basis, which is what the notice in question means when considered as it must be in connection with the legislation binding upon the Secretary of the Treasury, was not such a notice as the bonds prescribed for the exercise of the option retained by the government."

We are not now concerned with the power of the United States to discharge obligations at maturity in depreciated currency or clipped coin. Did they cause respondent's bond to mature before the ultimate due date by proper exercise of the option reserved when they sent out a notice which in effect stated that payment would not be made as provided by the bond, but otherwise? The answer ought not to be difficult where men anxiously uphold the doctrine that a contractual obligation "remains binding upon the conscience of the sovereign" and reverently fix their gaze on the Eighth Commandment.

We concur in the views tersely expressed in the following paragraph excerpted from the opinion below—

"No amount of argument can obscure the real situation. It is this: The government has promised to pay the bonds in question in gold coin of the standard of value prevailing in 1917. By their terms, it is permitted to redeem them only by paying them at their face value. It is proposed to redeem them, not by paying them at that face value, but in paper money worth only about 59 per cent thereof. The notice which it has issued means this and nothing else. Such a notice is not in accordance with the condition of redemption specified in the bond, and consequently does not stop the running of interest or avoid the coupons."

The challenged judgment was correct and should be affirmed.